

(24,606)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 388.

CLARENCE A. CRANE, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF SPECIAL SESSIONS, FIRST DISTRICT,
CITY OF NEW YORK, STATE OF NEW YORK.

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a Court of Appeals.

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the 25th Day of February, in the Year of Our Lord One Thousand Nine Hundred and Fifteen, Before the Judges of said Court.

Witness, the Hon. Willard Bartlett, Chief Justice, presiding;
R. M. Barber, Clerk.

Remittitur, February 26, 1915.

THE PEOPLE, &c., Appellant,
agst.
CLARENCE A. CRANE, Respondent.

Be it remembered, that on the 11th day of January, in the year of our Lord one thousand nine hundred and fifteen—The People, &c.—the Appellant—in this proceeding came here into the Court of Appeals, by Charles Albert Perkins—District Attorney—and filed in the said Court a notice of appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the First Judicial Department, reversing a judgment of conviction rendered against defendant in the Court of Special Sessions, First Division, City of New York. And—Charles (sic) A. Crane—the respondent in said proceeding afterward appeared in said Court of Appeals by Edward M. Grout, his attorney.

b Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Robert S. Johnstone of counsel for the appellant—and by Mr. Edward M. Grout of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is reversed and judgment of conviction affirmed.

And it was also further ordered, that the record aforesaid and the proceedings in this Court, be remitted to the Court of Special Sessions, First Division, City of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said Judgment of Appellate Division be reversed and judgment of conviction affirmed as aforesaid,

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the Judgment of the Court of Appeals aforesaid, by them given in the premises are by the said Court of Appeals re-

mitted into the Court of Special Sessions before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Court of Special Sessions before the Justices thereof, etc.

R. M. BARBER,
Clerk of the Ct. of Ap. of the S. of N. Y.

CT. OF AP., CL'K'S OF.,
ALBANY, Feb. 26, 1915.

I hereby certify that the *preceding* record contains a correct transcript of the proceedings in the Court of Appeals; with the papers originally filed therein attached thereto.

[SEAL.]

R. M. BARBER, *Clerk.*

c

Court of Appeals, State of New York.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant,
against
CLARENCE A. CRANE, Defendant-Respondent.

CASE ON APPEAL.

Charles Albert Perkins, District Attorney, New York County.
Edward M. Grout, Attorney for Defendant-Respondent, 115
Broadway, New York City, N. Y.

Received at 115 Broadway, Jan. 8, 1915. Edward M. Grout and
Paul Grout. M.

1 Supreme Court, Appellate Division, First Department.

PEOPLE OF THE STATE OF NEW YORK, Respondent,
against
CLARENCE A. CRANE, Appellant.

Statement under Rule 41.

This proceeding was instituted by complaint made to and warrant issued by City Magistrate House, followed by the arrest of the defendant, and information filed by the District Attorney of New York County. Defendant appeared by Edward M. Grout and Paul Grout, his attorneys. The respondent appeared by Charles S. Whitman, District Attorney. Trial was had at Special Sessions, and the defendant found guilty and fined \$50. There has been no change of parties or attorneys.

2

Notice of Appeal.

Court of Special Sessions of the City of New York, Part I.

PEOPLE OF THE STATE OF NEW YORK, Respondent,
against
CLARENCE A. CRANE, Appellant.

To John P. Hilly, Clerk, Part I, Court of Special Sessions, Hon.
Charles S. Whitman, District Attorney of New York:

GENTLEMEN: Please Take Notice, that the defendant above named
appeals to the Appellate Division of the Supreme Court, First De-
partment, from the judgment of conviction rendered against him
in this court, on the 9th day of December, 1914, and from each and
every part thereof.

Dated, New York, December 9th, 1914.

EDWARD M. GROUT &
PAUL GROUT,
Attorneys for Defendant-Appellant.

Office and Post-Office Address, 115 Broadway, Borough of Man-
hattan, New York City.

3

Extract from Minutes.

At a Court of Special Sessions of the First Division of the City of
New York, held in the County of New York, at the Building for
Criminal Courts in the Borough of Manhattan, in said City, on
Wednesday, the 9th day of December, in the year of our Lord
one thousand nine hundred and fourteen.

Present: Honorables James J. McInerney, Howard J. Forker,
Lorenz Zeller, Justices of the Court of Special Sessions of the First
Division of the City of New York.

THE PEOPLE OF THE STATE OF NEW YORK
against
CLARENCE A. CRANE.

On conviction by trial of the Misdemeanor of unlawfully employ-
ing persons not citizens of the United States in the construction
of a public work of a municipality by a person contracting with
the municipality for the construction thereof, in violation of Sec-
tion 14 of the Labor Law of the State of New York.

It is thereupon Ordered and Adjudged by the Court, that the said
Clarence A. Crane, for the Misdemeanor aforesaid, whereof he is
convicted, pay a fine of Fifty Dollars. And it is further ordered

4 that he stand committed to the custody of the Keeper of the City Prison of The City of New York until the said fine be paid, but not exceeding ten days.

A true extract from the Minutes.

[SEAL.]

JOHN P. HILLY,
Clerk of Court.

Fine paid.
J. J. M.

Information.

Court of Special Sessions of the City of New York.

THE PEOPLE OF THE STATE OF NEW YORK
against
CLARENCE A. CRANE, Defendant.

Be it Remembered that I, Charles S. Whitman, the District Attorney of the County of New York, by this information accuse the above-named defendant of the Crime of Unlawfully Employing Persons Not Citizens of the United States in the Construction of a Public Work of a Municipality by a Person Contracting with the Municipality for the Construction thereof, committed as follows:

Heretofore, at The City of New York, in the County of New York, on the 24th day of November, 1914, in the Borough of Manhattan, the said Clarence A. Crane was engaged, as a person contracting with the municipality of The City of New York, in the construction of a public work of such municipality, to wit, the construction and installation of catch basins at the northwest corner of Kenmare Street and Cleveland Place, in said Borough, City and County, such public work being then and there done and constructed by the said Clarence A. Crane under and by virtue of a contract theretofore and on the 23rd day of November, 1914, made and entered into between him and the said City of New York, for the construction of said catch basins by the said Clarence A. Crane for the said City of New York;

5 And on the said 24th day of November, 1914, at the Borough, City and County aforesaid, the said Clarence A. Crane, in the construction of the said public work of the said municipality, then and there being done and constructed by him as aforesaid as a person contracting with the said municipality for the construction thereof, did employ certain persons, to wit, Alexandro Treets, Frank La Mara and Joseph Pasanetti, not then citizens of the United States; against the form of the statute in such case made and provided and against the peace of the People of the State of New York and their dignity.

CHARLES S. WHITMAN,
District Attorney of the County of New York.

Deposition Before Magistrate.

City Magistrate's Court, First District, First Division.

CITY AND COUNTY OF —, ss:

Clarence A. Crane, being duly examined before the undersigned, according to law, on the annexed charge; and being informed that it is h- right to make a statement in relation to the charge
6 against h-; that the statement is designed to enable h-, if he sees fit, to answer the charge and explain the facts alleged against h-; that he is at liberty to waive making a statement and that -h- waiver cannot be used against h- upon the trial.

Question—What is your name?

Answer—Clarence A. Crane.

Question—How old are you?

Answer—40 years.

Question—Where were you born?

Answer—United States.

Question—Where do you live and how long have you resided there?

Answer—51 Chambers street.

Question—What is your business or profession?

Answer—Contractor.

Question—Give any explanation you may think proper of the circumstances appearing in the testimony against you and state any facts which you think will tend to your exculpation.

Answer—I am not guilty.

Question—Date of arrival in the United States.

Answer—

Question—How long in the United States.

Answer—

Question—Arrived at (port)?

Answer—

Question—Arrived under name of?

Answer—

(Sgd.)

C. A. CRANE.

The defendant received examination before this court (F. B. H.).

Taken before me this 1st day of December, 1914.

F. B. HOUSE,
City Magistrate,
C.

Warrant.

First Division, City Magistrate's Court, First District.

CITY AND COUNTY OF NEW YORK, ss:

In the name of the People of the State of New York to the Sheriff of the County of New York, or to any Marshal or Policeman of the City of New York, or to any peace officer in the County of New York, Greeting:

Whereas, Complaint in writing and upon oath has been made before the undersigned, one of the City Magistrates for The City of New York by Edward M. Ward, of No. 51 Chambers street, that on the 24th day of November, 1914, at The City of New York, in the County of New York, Clarence A. Crane did violate section 14 of the Labor Law of the State of New York, in that he did, while engaged in a public work, in the construction of catch basins, under contract with The City of New York, employ Alexandro Treets, Frank La Mana and Joseph Passanetti, each and all of whom are not citizens of the United States.

Wherefore, the said complainant has prayed that the said defendant may be apprehended and bound to answer the said complaint.

These are therefore, in the name of the People of the State of New York, to command you, the said Sheriff, Marshals and Policemen, and each and every one of you to apprehend the said defendant and bring him forthwith before me at the First District City Magistrate's Court in the said City, or in case of my absence or inability to act, before the nearest or most accessible City Magistrate in this city, to answer the said charge and to be dealt with according to law.

8

Dated at the City of New York this 1st day of December, 1914.

F. B. HOUSE,
City Magistrate.

Affidavit of Edward M. Ward.

City Magistrate's Court, First District, First Division.

THE PEOPLE OF THE STATE OF NEW YORK
against

CLARENCE A. CRANE, Defendant.

CITY, COUNTY, AND STATE OF NEW YORK, ss:

Edward M. Ward, being duly sworn, deposes and says:

That he is engaged in business as a general contractor at 51 Chambers street, Borough of Manhattan, in the City of New York. That on the 24th day of November, 1914, the said Clarence E. Crane, at the Borough and City aforesaid did violate section 14 of the Labor

Law as follows: Said Clarence A. Crane, on the 24th day of November, 1914, at the Borough of Manhattan and City of New York was engaged in the construction of catch basins at the northwest corner of Kenmare street and Cleveland place in the said City and Borough, and the said construction was a public work being made by the said

9 Crane under and by virtue of a contract entered into between the said Clarence A. Crane and The City of New York on the 23d day of November, 1914.

On the said 24th day of November, 1914, the said Clarence A. Crane employed and still employs on such public work then and now being done by him, in pursuance of the contract between him and The City of New York, Alexandro Treets, Frank La Mana and Joseph Passanetti, each and all of whom are not citizens of the United States.

Wherefore, deponent prays that this Court issue its warrant for the arrest of said Clarence A. Crane and that he be apprehended and dealt with according to law.

EDWARD M. WARD.

Sworn to before me this 1st day of December, 1914.

F. B. HOUSE,
City Magistrate.

Affidavit of Frank La Mana.

First Division, City Magistrate's Court, 1st District.

CITY AND COUNTY OF NEW YORK, ss:

Frank La Mana, aged 27 years, occupation, laborer, of No. 212 Chrystie street, being duly sworn, deposes and says that he has heard read the foregoing affidavit of Edward M. Ward and that he knows the facts stated therein on information of deponent are true of deponent's own knowledge.

FRANCESCO LA MANA.

Sworn to before me this 1st day of Dec., 1914.

F. B. HOUSE,
City Magistrate.

10

Affidavit of Alexandro Treets.

First Division, City Magistrate's Court, 1st District.

CITY AND COUNTY OF NEW YORK, ss:

Alexandro Treets, aged 28 years, occupation, laborer, of No. 205 East 12th street, being duly sworn, deposes and says that he has heard read the foregoing affidavit of Edward M. Ward and that he knows the facts stated therein on information of deponent are true of deponent's own knowledge.

ALEXANDRO TREETS.

Sworn to before me this 1st day of Dec., 1914.

F. B. HOUSE,
City Magistrate.

Affidavit of Joseph Passanetti.

First Division, City Magistrate's Court, 1st District.

CITY AND COUNTY OF NEW YORK, ss:

Joseph Passanetti, aged 28 years, occupation laborer, of No. 106 First avenue, being duly sworn, deposes and says that he has heard read the foregoing affidavit of Edward M. Ward and that he knows the facts stated therein on information of deponent are true of deponent's own knowledge.

JOSEPH PASSANETTI.

Sworn to before me this 1st day of Dec., 1914.

F. B. HOUSE,
City Magistrate.

11 Court of Special Sessions of the City of New York, Part I.

Before Hons. James J. McInerney, Presiding Justice; Howard J. Forker and Lorenz Zeller, Associate Justices.

THE PEOPLE, etc., Plaintiff,
against
CLARENCE A. CRANE, Defendant.

NEW YORK, December 9, 1914.

Charge—Employing aliens in public works.

Appearances: For the defendant, Edward M. Grout, Esq., Counsel; for the People, Assistant District Attorney Floyd C. Wilmot, Esq.

Transcript of Stenographer's Minutes.

WILLIAM R. PATTERSON, residing at 533 West 112th street, being duly sworn in behalf of the People, testifies as follows:

Direct examination.

By Mr. WILMOT:

Q. What is your position?

A. Assistant Commissioner of Public Works, Borough of Manhattan.

Q. And you were during the month of November, 1914.

A. I was.

Q. I show you this piece of paper and ask you if you recognize it?

A. I do.

Q. What is that, doctor?

12 A. Requisition submitted to me by the Chief of the Bureau of Sewers requesting that I secure bids for the placing of a receiving basin at Kenmare street and Cleveland place, together with blueprint showing same and specifications thereto.

Q. What are your duties in your said position?

A. My duties are to sign all orders, contracts, pay-rolls, vouchers, secure bids upon all requisitions, have charge of the accounts and administrative records of the office of the President of the Borough of Manhattan.

Mr. WILMOT: I offer this paper in evidence.

Mr. GROUT: No objection.

The COURT: Received in evidence as People's Exhibit 1.

Q. Now, doctor, in pursuance to your duties and as a result of People's Exhibit No. 1, did you call for bids in reference to this particular work?

A. I requested that bids be taken from several contractors whose names were in our department as wanting work of that kind and those bids were sent out.

Q. In pursuance of that did you also send a letter to the defendant, Charles A. Crane?

A. I did.

Q. Did you through the course of the mail receive a response to your communication to C. A. Crane?

A. Yes, sir.

Q. I show you this piece of paper and ask you if that is the letter to which you refer that you received?

A. Yes, sir.

Mr. WILMOT: I offer it in evidence.

Mr. GROUT: No objection.

The COURT: Received as People's Exhibit 2 in evidence.

13 Q. You also, did you not, doctor, send requests for bids to other people in the City of New York?

A. Yes, sir.

Q. And this was a public work, was it not, of The City of New York?

A. It was.

Mr. WILMOT: I assume the Court will take judicial notice that The City of New York is a municipality.

The COURT: Yes.

Q. I show you this piece of paper and ask you if you recognize your signature there?

A. Yes, sir.

Q. Is that the final voucher or contract that you made with the defendant?

A. It is the final contract form issued by the Department of Public Works authorizing him to proceed with the work authorized in specifications attached thereto.

(McINERNEY, J. P.):

Q. Were these competitive bids?

A. Yes, sir.

Q. And the contract was awarded to him?

A. Yes, sir.

(ZELLER, J.):

Q. As the lowest bid?

A. Yes, sir, three were received.

Mr. WILMOT: I offer it in evidence.

Mr. GROUT: No objection.

The COURT: Received in evidence as People's Exhibit 3.

Q. I show you again People's Exhibit No. 1, copy of those specifications went to the defendant at the time you sent out for a bid?

A. Yes, sir, together with a blueprint.

Mr. GROUT: No cross-examination.

14 EDWARD M. WARD, residing at Richmond Hill, Long Island, being duly sworn in behalf of the People, testifies as follows:

Direct examination.

By Mr. WILMOT:

Q. What is your business?

A. General contractor.

Q. Do you know the defendant, Clarence A. Crane?

A. Yes, sir.

Q. Did you see him on the 24th of November, 1914?

A. Yes, sir.

Q. Where did you see him at that time?

A. I saw him at Kenmare street, up at the job, Kenmare and Cleveland place.

Q. In the City and County of New York?

A. Yes, sir.

Q. What was he doing there at that time, if anything?

A. He was standing over his job taking charge of the men and generally in charge of his work.

Q. What were they building there at the time?

A. A receiving basin.

Q. A catch basin as they are sometimes called?

A. Yes, sir.

Q. Did you have a conversation with him at that time?

A. Yes, sir; I spoke to him.

Q. What did you say to the defendant and he to you in reference to this particular work?

A. I asked how many men he had on the job and he told me, and I asked him were they citizens of the United States, and he said, no, they weren't, and I asked permission to interview the men and he told me to go ahead and talk to them.

Q. Did you talk to any of them in the defendant's presence?

A. I called them up out of the job and asked them one by one were they citizens.

15 (McINERNEY, J. P.):

Q. Was that in the presence of the defendant?

A. He was there but he wasn't listening to the conversation.

Q. How far away was he?

A. Fifteen or twenty feet away. The men were down in the hole and I climbed down, half way down in the hole and spoke to them.

By ZELLER, J.:

Q. After you had the conversation did you speak to the defendant again?

A. When I finished talking to the men he spoke to me.

Q. What was the conversation then?

A. Nothing in particular.

By McINERNEY, J. P.:

Q. Did you say anything to him about the conversation you had had with his men as to their citizenship?

A. Yes, sir, I told him that I interviewed the men and got their names and their wages and were they citizens, and their addresses, and they told me they weren't citizens. I told him that they weren't citizens and he said he knew it.

By Mr. WILMOT:

Q. And these that you interviewed were Frank Lamano?

A. Yes, sir.

Q. Alexander Treets?

A. Yes, sir.

Q. And Joseph Passinetti?

A. Yes, sir.

(McINERNEY, J.):

Q. How many laborers did you interview there?

A. Three.

Q. Did you have any conversation with the defendant in relation to what nationality any of these workmen were?

A. No, I don't think I brought that out.

Mr. GROUT: No cross-examination.

16 JOSEPH PASSANNETTI, residing at 105 First avenue, Borough of Manhattan, being duly sworn in behalf of the People, testifies as follows, through Interpreter Lemon:

Direct examination.

By Mr. WILMOT:

Q. Were you employed on the 24th of November, 1914, at the northwest corner of Kenmare street and Cleveland place?

A. Yes, sir.

Q. County of New York?

A. Yes, sir.

Q. What were you working at there?

A. Manual labor.

Q. What were they building there, do you know?

A. A sewer.

Q. Basins?

A. Yes, sir.

Q. Who hired you?

A. I don't know.

Q. Did you see Mr. Crane there, the defendant?

A. Yes, sir.

Q. Was he your boss?

A. Yes, sir.

Q. Are you a citizen of the United States?

A. No, sir.

Q. Do you know Frank Lamano?

A. No, sir.

Q. Do you know Alexander Treets?

A. No, sir.

(By the COURT:)

Q. What country do you come from?

A. Italy.

Q. How long have you been in the United States?

A. Five years.

Q. Did you see Mr. Ward there that day, this gentleman (indicating)?

A. Yes, sir.

Q. Did you have a conversation with him?

A. Yes, sir.

17 EDWARD WARD, recalled:

By Mr. WILMOT:

Q. Is the last witness, Passannetti, one of the men you had a conversation with that day?

A. Yes, sir.

Q. And you saw him working there on that particular job that day?

A. Yes, sir.

Q. And he is one of the men that you called up out of the job and that you had a conversation with in reference to it?

A. Yes, sir.

Mr. WILMOT: The People rest.

Defense.

Mr. GROUT: Our defense is the unconstitutionality of this law. It is a violation of the treaties of the United States and of the Con-

stitution of the United States and of the State of New York. I would like to read into the record the pertinent parts of the various treaties. I move for dismissal on the ground that the provision of law that this defendant is accused of violating is unconstitutional and void, and especially on the ground that it is in violation of the treaties of the United States with foreign countries, and particularly the treaty with Italy.

The COURT: Motions denied.

Exception by the defendant.

Mr. GROUT: I now offer in evidence the following excerpts from treaties taken from an official compilation of treaties between the United States and other powers.

By the DISTRICT ATTORNEY: I object to any of the treaties as none of the parties are foreign subjects.

18 We further object to the treaty between the United States and Italy likewise upon the ground that none of the parties to this proceeding is a subject of the King of Italy.

McINERNEY, J. P.: The Court at this time will overrule your objection.

By the DISTRICT ATTORNEY: If the treaty is competent in evidence there won't be any objection to the official printed copy being received as proof of what it is, but our objection is to the competency and admissibility of the treaty.

Mr. GROUT: I offer Article 1 of the Treaty between the United States and Italy, made on February 25, 1913, and relates to rights and privileges of the contracting parties.

DISTRICT ATTORNEY: We object on the same ground.

Treaty Between the United States and Italy.

Signed at Washington February 25, 1913.

Ratification advised by Senate February 26, 1913.

Ratified by President March 1, 1913.

Ratified by Italy June 21, 1913.

Ratifications exchanged at Washington July 3, 1913.

Proclaimed July 3, 1913.

The COURT: Overruled. Admitted in evidence as Defendant's Exhibit A.

Art. 1. The citizens of each of the High Contracting Parties shall receive in the States and Territories of the other the most constant security and protection for their persons and property and
19 for their rights, including that form of protection granted by any state or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs; and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter.

Mr. GROUT: I make one offer of the other treaties; with the Argentine Republic July 27, 1853, Article 8; treaty with Austria Hungary August 27, 1889, article 1; Belgium, March 8, 1875, article 1; Bolivia, May 13, 1858, article 3, Borneo, July 20, 1850, article 2; Chile, May 16, 1832, article 3; China, March 17, 1894, article 4; Colombia, December 12, 1846, article 3; Costa Rica 1851, article 7; Denmark, April 26, 1826, article 2, Ecuador, June 13, 1839, article 2; Japan, February 21, 1811, article 1; Liberia, October 21, 1862, article 2; Paraguay, February 4, 1859, article 9; Persia, December 13, 1856, article 3; Peru, August 31, 1867, article 2; Salvador, December 6, 1870, article 2; Servia, October 14, 1881, article 1; Spain, July 3, 1902, article 2; Switzerland, November 25, 1850; Venezuela, August 27, 1860, article 3.

DISTRICT ATTORNEY: I object to the introduction of the treaties on the ground that they have no materiality in this proceeding; none of the parties to it and nobody who was connected in any way with the subject matter of the contract or employed in the performance of the work being a subject or citizen of any of the countries referred to.

20 The COURT: Objections overruled. The papers offered by the defendant are admitted in evidence as Defendant's Exhibit B.

Treaty Between United States and Argentine Republic.

Concluded July 27, 1853.

Ratification advised by the Senate June 13, 1854.

Ratified by President June 29, 1854.

Ratifications exchanged December 20, 1854.

Proclaimed April 9, 1855.

Art. 8. All merchants, commanders of ships and other citizens of the United States shall have full liberty in all the territories of the Argentine Confederation to manage their own affairs themselves, or to commit them to the management of whomsoever they please, as broker, factor, agent or interpreter; nor shall they be obliged to employ any other persons in those capacities than those employed by citizens of the Argentine Confederation, nor to pay them any other salary or remuneration than such as is paid in like cases by citizens of the Argentine Confederation. And absolute freedom shall be allowed in all cases to the buyer and seller to bargain and fix the price of any goods, wares or merchandise, imported into, or exported from, the Argentine Confederation, as they shall see good, observing the laws and established customs of the country. The same rights and privileges, in all respects, shall be enjoyed in the territories of the United States, by the citizens of the Argentine Confederation. The citizens of the two contracting parties shall reciprocally receive and enjoy full and complete protection for

21 their persons and property, and shall have free and open access to the courts of justice in the said countries respectively, for the prosecution and defense of their just rights, and they shall be at

liberty to employ in all cases such advocates, attorneys or agents as they may think proper; and they shall enjoy, in this respect, the same rights and privileges therein as native citizens.

Treaty Between United States and Austria-Hungary.

Concluded August 27, 1829.

Ratification advised by the Senate February 10, 1830.

Ratified by the President February 11, 1830.

Ratifications exchanged February 10, 1831.

Proclaimed February 10, 1831.

Art. 1. There shall be between the territories of the High Contracting Parties a reciprocal liberty of commerce and navigation. The inhabitants of their respective States shall mutually have liberty to enter the ports, places and rivers of the territories of each party, wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their commercial affairs; and they shall enjoy to that effect the same security, protection and privileges as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing.

22 *Treaty Between United States and Belgium.*

Concluded March 8, 1875.

Ratification advised by the Senate March 10, 1875.

Ratified by the President March 16, 1875.

Ratifications exchanged June 11, 1875.

Proclaimed June 29, 1875.

Art. 1. There shall be full and entire freedom of commerce and navigation between the inhabitants of the two countries, and the same security and protection which is enjoyed by the citizens or subjects of each country shall be guaranteed on both sides. Said inhabitants wherever established or temporarily residing within any ports, cities, or places whatever of the two countries, shall not, on account of their commerce or industry pay any other or higher duties, taxes or imposts than those which shall be levied on citizens or subjects of the country in which they may be; and the privileges, immunities and other favors, with regard to commerce or industry — shall be enjoyed by the citizens or subjects of one of the two states shall be common to those of the other.

Treaty Between United States and Bolivia.

Concluded May 13, 1858.

Ratification advised with amendments by Senate June 26, 1860.

Amendments proposed by Constituent Assembly of Bolivia consented to by Senate and time for exchange extended February 3, 1862.

Ratified by the President February 17, 1862.

Ratifications exchanged November 9, 1862.

Proclaimed January 8, 1863.

23 Art. 3. The United States of America and the Republic of Bolivia mutually agree that there shall be reciprocal liberty of commerce and navigation between their respective territories and citizens. The citizens of either Republic may frequent with their vessels all the coasts, ports and places of the other where foreign commerce is permitted and reside in all parts of the territory of either, and occupy dwellings and warehouses; and everything belonging thereto shall be respected, and shall not be subjected to any arbitrary visits or search. The said citizens shall have full liberty to trade in all parts of the territory of either, according to the rules established by the respective regulations of commerce, in all kinds of goods, merchandise, manufactures, and produce not prohibited to all, and to open retail stores and shops under the same municipal and police regulations as native citizens; and they shall not in this respect be liable to any other or higher taxes or imposts than those which are or may be paid by native citizens. No examination or inspection of their books, papers or accounts shall be made without the legal order of a competent tribunal or judge.

The provisions of this treaty are not to be understood as applying to navigation and coast trade between one port and another, situated in a territory of either of the contracting parties—the regulation of such navigation and trade being reserved respectively by the parties according to their own separate laws. The vessels of either country shall be permitted to discharge part of their cargoes at one port open to foreign commerce in the territories of either of the high contracting parties, paying only the custom house duties upon that portion of the cargo which may be discharged and to proceed
24 with the remainder of their cargo to any other port or portions of the same territory, open to foreign commerce, without paying other or higher tonnage duties or port charges in such cases than would be paid by national vessels under like circumstances; and they shall be permitted to load in like manner at different ports in the same voyage outward.

The citizens of either country shall also have an unrestrained right to travel in any part of the possessions of the other and shall in all cases enjoy the same security and protection as the natives of the country in which they reside, on condition of their submitting to the laws, decrees and ordinances there prevailing. They shall not be called upon for any forced loan or occasional contribution, nor

shall they be liable to any embargo or be detained with their vessels, cargoes or merchandise, goods or effects, for any military expedition or for any public purposes whatsoever without being allowed therefor a full and sufficient indemnification which shall in all cases be agreed upon and paid in advance.

Treaty Between United States and Borneo.

Concluded June 23, 1850.

Ratification advised and time for exchange of ratifications extended by the Senate June 23, 1852.

• Ratified by the President January 31, 1853.

Ratifications exchanged July 11, 1853.

Proclaimed July 12, 1854.

Art. 2. The citizens of the United States of America shall have full liberty to enter into, reside in, trade with, and pass with
25 their merchandise through all parts of the dominions of His Highness, the Sultan of Borneo, and they shall enjoy therein all the privileges and advantages, with respect to commerce or otherwise, which are now or which may hereafter be granted to the citizens or subjects of the most favored nation; and the subjects of His Highness, the Sultan of Borneo, shall in like manner be at liberty to enter into, reside in, trade with, and pass with their merchandise through all parts of the United States of America as freely as the citizens and subjects of the most favored nation; and they shall enjoy in the United States of America all the privileges and advantages with respect to commerce or otherwise, which are now or which may hereafter be granted therein to the citizens or subjects of the most favored nation.

Treaty Between United States and Chile.

Concluded May 16, 1832.

Ratification advised by the Senate December 19, 1832.

Ratified by the President April 26, 1834.

Ratification- exchanged April 29, 1834.

Proclaimed April 29, 1834.

Art. 3. The citizens of the United States of America may frequent all the coasts and countries of the Republic of Chile, and reside and trade there in all sorts of produce, manufactures and merchandise, and shall pay no other or greater duties, charges or fees, whatsoever,
26 than the most favored nation is or shall be obliged to pay; and they shall enjoy all the rights, privileges and exemptions in navigation and commerce which the most favored nation does or shall enjoy, submitting themselves, nevertheless to the laws, decrees, and usages there established, and to which are submitted the citizens and subjects of the most favored nations.

In like manner the citizens of the Republic of Chile may frequent

all the coasts and countries of the United States of America, and reside and trade there, in all sorts of produce, manufactures and merchandise, and shall pay no other greater duties, charges or fees whatsoever, than the most favored nation is or shall be obliged to pay, and they shall have all the rights, privileges and exemptions in commerce and navigation which the most favored nation does or shall enjoy, submitting themselves, nevertheless, to the laws, decrees and usages there established, and to which are submitted the citizens and subjects of the most favored nation. But it is understood that this article does not include the coasting trade of either country, the regulation of which is reserved by the parties, respectively, according to their own separate laws.

Treaty Between United States and China.

Concluded March 17, 1894.

Ratification advised by the Senate August 13, 1894.

Ratified by the President August 22, 1894.

Ratifications exchanged December 7, 1894.

Proclaimed December 8, 1894.

Art. 4. In pursuance of Article III of the Immigration Treaty between the United States and China signed at Peking on the 27 17th day of November, 1880 (the 15th day of the tenth month of Kwangshii, sixth year), it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily, residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens. And the Government of the United States reaffirms its obligation, as stated in said Article III, to exert all its power to secure protection to the persons and property of all Chinese subjects in the United States.

Treaty Between United States and Colombia.

Concluded December 12, 1846.

Ratification advised by the Senate June 3, 1848.

Ratified by the President June 10, 1848.

Ratifications exchanged June 10, 1848.

Proclaimed June 12, 1848.

Art. 3. The two high contracting parties being likewise desirous of placing the commerce and navigation of their respective countries on the liberal basis of perfect equality and reciprocity mutually agree that the citizens of each may frequent all the coasts and countries of the other, and reside and trade there in all kinds of produce, manufactures and merchandise; and that they shall enjoy all the rights, privileges and exemptions in navigation and commerce, which native citizens do or shall enjoy, submitting themselves to

28 the laws, decrees and usages there established to which native citizens are subjected. But it is understood that this article does not include the coast trade of either country, the regulation of which *ns* reserved by the parties, respectively, according to their own separate laws.

Treaty Between United States and Costa Rica.

Concluded July 10, 1851.

Ratification advised by the Senate March 11, 1852.

Ratified by the President May 25, 1852.

Ratifications exchanged May 26, 1852.

Proclaimed May 26, 1852.

Art. 7. All merchants, commanders of ships and others, citizens of the United States, shall have full liberty, in all the territories of the Republic of Costa Rica, to manage their own affairs themselves, or to commit them to the management of whomsoever they please, as broker, factor, agent or interpreter; nor shall they be obliged to employ any other persons in those capacities than those employed by Costa Ricans, nor to pay them any other salary or remuneration than such as are paid in like cases by Costa Ricans. And absolute freedom shall be allowed in all cases to the buyer and seller to bargain and fix the price of any goods, wares or merchandise, imported into, or exported from the Republic of Costa Rica, as they shall see good, observing the laws and established customs of the country. The same privileges shall be enjoyed in the territories of the United States by the citizens of the Republic of Costa Rica under the same conditions.

29 The citizens of the high contracting parties shall reciprocally receive and enjoy full and perfect protection for their persons and property, and shall have free and open access to the courts of justice in the said countries respectively, for the prosecution and defense of their just rights; and that they shall be at liberty to employ in all cases, advocates, attorneys or agents of whatever description, whom they may think proper, and they shall enjoy in this respect the same rights and privileges therein as native citizens.

Treaty Between United States and Denmark.

Concluded April 26, 1826.

Ratification advised by the Senate May 4, 1826.

Ratified by the President May 6, 1826.

Ratifications exchanged August 10, 1826.

Proclaimed October 14, 1826.

Art. 2. The contracting parties being likewise desirous of placing the commerce and navigation of their respective countries on the liberal basis of perfect equality and reciprocity, mutually agree that

the citizens and subjects of each may frequent all the coasts and countries of the other, (with the exception hereinafter provided for in the sixth article) and reside and trade there in all kinds of produce, manufactures and merchandise; and they shall enjoy all the rights, privileges and exemptions, in navigation and commerce, which native citizens or subjects do or shall enjoy, submitting themselves to the laws, decrees and usages there established, to which native citizens or subjects are subjected. But it is understood that this article does not include the coast trade of either country,

30 the regulation of which is reserved by the parties, respectively, according to their own separate laws.

Treaty Between United States and Ecuador.

Concluded June 13, 1839.

Ratification advised by the Senate July 15, 1840.

Ratified by the President July 31, 1840.

Ratifications exchanged April 9, 1842.

Proclaimed September 23, 1842.

Art. 11. The two high contracting parties, being likewise desirous of placing the commerce and navigation of their respective countries on the liberal basis of perfect equality and reciprocity, mutually agree that the citizens of each may frequent all the coasts and countries of the other, and reside and trade there in all kinds of produce, manufactures and merchandise; and they shall enjoy all the rights, privileges and exemptions in navigation and commerce which native citizens do or shall enjoy, submitting themselves to the laws, decrees and usages there established, to which native citizens are subjected; but it is understood that this article does not include the coasting trade of either country, the regulation of which is reserved by the parties respectively, according to their own separate laws. And it is further agreed that this article shall be subject to the following modification: That whereas by a law of Ecuador of March 21, 1837, vessels built in the dock yard of Guayaquil shall be exempted from various charges; therefore vessels of the United States cannot claim this privilege, but shall enjoy it if it shall be granted to vessels belonging to Spain, or to Mexico and to the other

31 Hispano-American Republics.

Treaty Between United States and Japan.

Signed at Washington February 21, 1911.

Ratification advised by the Senate with amendment February 24, 1911.

Ratified by the President March 2, 1911.

Ratified by Japan March 31, 1911.

Ratifications exchanged at Tokyo April 4, 1911.

Proclaimed April 5, 1911.

Art. 1. The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories

of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

They shall not be compelled under any pretense whatever to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

The citizens or subjects of each of the High Contracting Parties shall receive, in the territories of the other the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves

32 to the conditions imposed upon the native citizens or subjects.

They shall, however, be exempt in the territories of the other from compulsory military service, either on land or sea, in the regular force, or in the national guard, or in the militia; from all contributions imposed in lieu of personal service and from all forced loans or military exactions or contributions.

Treaty Between United States and Liberia.

Concluded October 21, 1862.

Ratification advised by the Senate January 9, 1863.

Ratified by the President January 12, 1863.

Ratifications exchanged February 17, 1863.

Proclaimed March 8, 1866.

Art. 2. There shall be reciprocal freedom of commerce between the United States of America and the Republic of Liberia. The citizens of the United States of America may reside in and trade to any part of the territory of the Republic of Liberia to which any other foreigner was or shall be admitted. They shall enjoy full protection for their persons and properties; they shall be allowed to buy from and sell to whom they like, without being restrained or prejudiced by any monopoly, contract or exclusive privilege of sale or of purchase whatever; and they shall moreover enjoy all other rights and privileges which are or may be granted to any other foreigners, subjects, or citizens of the most favored nation. The citizens of the Republic of Liberia shall, in return, enjoy similar protection and privileges in the United States of America and in their territories.

33

Treaty Between United States and Paraguay.

Concluded February 4, 1859.

Ratification advised by the Senate February 24, 1860.

Ratified by the President February 27, 1860.

Ratifications exchanged March 7, 1860.

Proclaimed March 12, 1860.

Art. 9. All merchants, commanders of ships, and others, citizens of each country respectively, shall have full liberty, in all the terri-

tories of the other, to manage their own affairs themselves, or to commit them to the management of whomsoever they please, as agent, broker, factor or interpreter; and they shall not be obliged to employ any other persons than those employed by natives nor to pay to such persons as they shall think fit to employ any higher salary or remuneration than such as is paid in like cases by natives.

The citizens of the United States of America in the territories of Paraguay and the citizens of Paraguay in the United States of America, shall enjoy the same full liberty which is now or may hereafter be enjoyed by natives of each country respectively, to buy from and to sell to whom they like all articles of lawful commerce and to fix the price thereof as they shall see good, without being affected by any monopoly, contract or exclusive privilege of sale or purchase, subject however, to the general ordinary contributions or imposts established by law.

34 The citizens of either of the two contracting parties in the territories of the other shall enjoy full and perfect protection for their persons and property, and shall have free and open access to the courts of justice for the prosecution and defense of their just rights. They shall enjoy, in this respect, the same rights and privileges as native citizens; and they shall be at liberty to employ in all cases, advocates, attorneys or agents, of whatever description, whom they may think proper.

Treaty Between United States and Persia.

Concluded December 13, 1856.

Ratification advised by the Senate March 10, 1857.

Ratified by the President March 12, 1857.

Ratifications exchanged June 13, 1857.

Proclaimed August 18, 1857.

Art. 3. The citizens and subjects of the two high contracting parties—travellers, merchants, manufacturers and others,—who may reside in the territory of either country shall be respected and efficiently protected by the authorities of the country and their agents and treated in all respects as the subjects and citizens of the most favored nation are treated.

They may reciprocally bring by land or by sea, into either country and export from it, all kinds of merchandise and products, and sell, exchange, or buy, and transport them to all places in the territories of either of the high contracting parties, it being however, understood that the merchants of either nation, who shall engage in the internal commerce of either country shall be governed in respect to such commerce, by the laws of the country in which
35 such commerce is carried on; and in case either of the high contracting powers shall hereafter grant other privileges concerning such internal commerce to the citizens or subjects of their Government, they shall be equally granted to the merchants of either nation engaged in such internal commerce within the territories of the other.

Treaty Between United States and Peru.

Concluded August 31, 1887.

Ratification advised by the Senate with amendment May 10, 1888.

Ratified by the President June 6, 1888.

Ratifications exchanged October 1, 1888.

Proclaimed November 7, 1888.

Art. II. The United States of America and the Republic of Peru mutually agree that there shall be reciprocal liberty of commerce and navigation between their respective territories and citizens; the citizens of either republic may frequent with their vessels all the coasts, ports and places of the other, wherever foreign commerce is permitted and reside in all parts of the territory of either, and occupy the dwellings and warehouses which they may require subject to the existing laws; and everything pertaining thereto shall be respected, and shall not be subjected to any arbitrary visits or search. The said citizens shall have full liberty to trade in all parts of the territories of either, according to the rules established by the respective regulations of commerce, in all kinds of goods, merchandise and manufactures, and produce not prohibited to all and to open retail and wholesale stores and shops under the same municipal
36 and police regulations as native citizens, and they shall not in this respect be liable to any other or higher taxes or imposts than those which are or may be paid by native citizens. The citizens of either country shall also have the unrestrained right to travel in any part of the possessions of the other and shall in all cases enjoy the same security and protection as the natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing; they shall not be called upon for any forced loan or extraordinary contribution for any military, or for any public purpose whatever, nor shall they be liable to any embargo, or be detained with their vessels, cargoes, merchandise, goods or effects, without being allowed therefor a full and sufficient indemnification, which shall in all cases be agreed upon and paid in advance.

Treaty Between United States and Salvador.

Concluded December 6, 1870.

Ratification advised by the Senate March 31, 1871.

Ratified by the President April 11, 1871.

Time for exchange of ratifications extended by convention of May 12, 1873.

Ratifications exchanged March 11, 1874.

Proclaimed March 13, 1874.

Art. 2. The two high contracting parties, being likewise desirous of placing the commerce and navigation of their respective countries on the liberal basis of perfect equality and reciprocity, mutually agree

that the citizens of each may frequent all the coasts and countries of
the other and reside therein and shall also have the power to
37 purchase and hold lands and all kinds of real estate and to
engage in all kinds of trade, manufacture and mining, upon
the same terms with the native citizens and shall enjoy all the privileges and concessions in these matters which are or may be made to the citizens of any country and shall enjoy all the rights, privileges and exemptions in navigation, commerce and manufactures, which native citizens do or shall enjoy, submitting themselves to the laws, decrees or usages there established to which native citizens are subjected. But it is understood that this article does not include the coasting trade of either country the regulation of which is reserved by the parties respectively, according to their own separate laws of the other.

Treaty Between the United States and Serbia.

Concluded October 14, 1881.

Ratification advised by the Senate July 5, 1882.

Ratified by the President July 14, 1882.

Ratifications exchanged November 15, 1882.

Proclaimed December 27, 1882.

Art. 1. There shall be reciprocally full and entire liberty of commerce and navigation between the citizens and subjects of the two high contracting powers, who shall be at liberty to establish themselves freely in each other's territory.

Citizens of the United States in Serbia and Serbia subjects in the United States shall reciprocally on conforming to the laws of the country be at liberty to enter, travel or reside in any part of
38 the respective territories to carry on their business, and shall enjoy in this respect for their persons and property the same protection as that enjoyed by natives or by the subjects of the most favored nation.

They shall be at liberty to exercise their industry and trade, both by wholesale and retail, in the whole extent of both territories, without being subjected as to their persons or property or with regard to the exercise of their trade or business, to any taxes, whether general or local, or to any imposts or conditions of any kind other or more onerous than those which are or may be imposed upon natives or upon subjects of the most favored nation.

In like manner in all that relates to lawful taxes, customs, formalities, brokerage, patents or samples introduced by commercial travelers and all other matters connected with trade, citizens of the United States in Serbia and Serbian subjects in the United States shall enjoy the treatment of the most favored nation, and all the rights, privileges, exemptions and immunities of any kind enjoyed with respect to commerce and industry by the citizens or subjects of the high contracting parties, or which are or may be hereafter conceded to the subjects of any third party, shall be extended to the citizens or subjects of the other.

39

Treaty Between United States and Spain.

Concluded July 3, 1902.

Ratification advised by the Senate December 16, 1902.

Ratified by the President February 6, 1903.

Ratifications exchanged April 14, 1903.

Proclaimed April 20, 1903.

Art. 2. There shall be a full, entire, reciprocal liberty of commerce and navigation between the citizens and subjects of the two High Contracting Parties, who shall have reciprocally the right on conforming to the laws of the country, to enter, travel and reside in all parts of their respective territories, saving only the right of expulsion which each Government reserves to itself, and they shall enjoy in this respect for the protection of their persons and property, the same treatment and the same rights as the citizens or subjects of the country or the citizens or subjects of the most favored Nation.

They can freely exercise their industry or their business, as well wholesale as retail, without being subjected as to their persons or property to any taxes, general or local, imposts or conditions whatsoever, other or more onerous than those which are imposed or may be imposed upon the citizens or subjects of the country or the citizens or subjects of the most favored Nation. It is however, understood that these provisions are not intended to annul or prevent or constitute any exception from the laws, ordinances and special regulations respecting taxation, commerce, health, police, and public security, in force or hereafter made in the respective countries and applying to foreigners in general.

40

Treaty Between United States and Switzerland.

Concluded November 25, 1850.

Ratification advised by the Senate with amendments March 7, 1851.

Ratified by the President March 12, 1851.

Ratification again advised by the Senate with amendment March 29, 1854.

Finally ratified by the President November 6, 1854.

Ratifications exchanged November 8, 1855.

Proclaimed November 9, 1855.

Art. 1. The citizens of the United States of America and the citizens of Switzerland shall be admitted and treated upon a footing of reciprocal equality in the two countries where such admission and treatment shall not conflict with the Constitution or legal provisions as well Federal and State as Cantonal, of the contracting party. The citizens of the United States and the citizens of Switzerland, as well as the members of their families, subject to the constitutional and legal provisions aforesaid, and yielding obedience to the laws, regulations and usages of the country wherein they reside, shall be

at liberty to come, go, sojourn temporarily and domiciliate or establish themselves permanently, the former in the cantons of the Swiss Confederation, the Swiss in the States of the American Union, to acquire, possess, and alienate therein property (as is explained in article five), to manage their affairs, to exercise their profession, their industry and their commerce; to have establishments, to possess warehouses, to consign their products and their merchandise,

and to sell them by wholesale or retail, either by themselves
 41 or by such brokers or other agents as they may think proper; they shall have full access to the tribunals and shall be at liberty to prosecute and defend their rights before courts of justice, in the same manner as native citizens, either by themselves or by such advocates, attorneys or other agents as they may think proper to select. No pecuniary or other more burdensome condition shall be imposed upon the residence or establishment or upon the enjoyment of the above mentioned rights than shall be imposed upon citizens of the country where they reside, nor any condition whatever to which the latter shall not be subject.

The foregoing privileges, however, shall not extend to the exercise of political rights, nor to a participation in the property of communities, corporations, or institutions of which the citizens of one party, established in the other, shall not have become members or co-proprietors.

Treaty Between United States and Venezuela.

Concluded August 27, 1860.

Ratification advised by the Senate February 12, 1861.

Ratified by the President February 25, 1861.

Ratifications exchanged August 9, 1861.

Proclaimed September 25, 1861.

Art. III. The citizens of the contracting parties shall be permitted to enter, sojourn, settle and reside in all parts of said territories and such as may wish to engage in business shall have the right to hire
 42 and occupy warehouses provided they submit to the laws as well general as special, relating to the rights of travelling, residing or trading. While they conform to the laws and regulations in force they shall be at liberty to manage themselves their own business, subject to the jurisdiction of either party, as well in respect to the consignment and sale of their goods by wholesale or retail, as with respect to the loading, unloading and sending of their ships. They may also employ such agents or brokers as they may deem proper and shall in all these cases be treated as the citizens of the country wherein they reside, it being nevertheless distinctly understood that they shall be subject to such laws and regulations also in respect to wholesale or retail. They shall have free access to the tribunals of justice in cases to which they may be a party on the same terms which are granted by the laws and usage of the country to native citizens; for which purpose they may employ in defense of their interests and rights such advocates, attorneys and other agents as they may think proper.

Mr. GROUT: I renew my motion for dismissal on the ground that this law is in violation of the treaty rights and in violation of the Constitution of the State of New York and of the United States.

The COURT: Motion denied. Exception to the defendant.

Mr. GROUT: The defense rests.

McINERNEY, J. P.: The Court finds the defendant guilty of this charge. Is the defendant ready for judgment?

Mr. GROUT: Yes, sir.

43 McINERNEY, J. P.: The judgment of the Court is that the defendant pay a fine of Fifty dollars, or in default thereof to be committed to the City Prison for the term of ten days.

Order Filing Record.

Court of Special Sessions, First Division.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
against
CLARENCE E. CRANE, Defendant.

It Is Ordered, That the foregoing printed record be filed in the office of the clerk of the Appellate Division of the Supreme Court, for the First Judicial Department.

Dated, New York, December 15th, 1914.

JAMES J. McINERNEY,
*Presiding Justice of the Court of Special
Sessions, First Division.*

44 *Stipulation Settling Case.*

Court of Special Sessions, First Division.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
against
CLARENCE E. CRANE, Defendant.

It Is Hereby Stipulated that the foregoing case contains all the evidence given upon the trial of this action, and that the same be settled in order to be filed herein.

Dated, New York, December 15, 1914.

CHARLES S. WHITMAN,
District Attorney, for the Plaintiff.
EDWARD M. GROUT AND
PAUL GROUT,
Attorneys for Defendant.

45 *Certificate of Clerk of Special Sessions.*

Court of Special Sessions, First Division.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
 against
 CLARENCE E. CRANE, Defendant.

I, John P. Hilly, Clerk of Part I of the Court of Special Sessions, do hereby certify that the within is a true copy of the notice of appeal, information, affidavits, deposition taken before the magistrate, testimony taken on the trial in this court, and all papers and the case and exceptions upon which this appeal is to be heard.

Clerk of Special Sessions.

46 *Affidavit of No Opinion.*

Court of Special Sessions, First Division.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
 against
 CLARENCE E. CRANE, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Joseph Neustadt, being duly sworn, deposes and says, that he is managing clerk in the office of the attorneys for the defendant herein. That no written opinion or memorandum was handed down by the justice in deciding this action.

JOSEPH NEUSTADT.

Sworn to before me, this 15th day of December, 1914.

GARDINER CONROY,
Notary Public, Kings County.

Certificate filed in New York County.

47 PLAINTIFF'S EXHIBIT "I."

119 M.

Highway Bur.—Receiving basin at N. W. Cor. Cleveland Pl. and Kenmare St.—Fri. Nov. 20.—Reg. No. 1442.

Bids asked.	Address.	Amount.
P. J. Kearns Contg. Co.,	2306 Creston Ave.	\$377.00
Daniel J. Donelin,	14 East 125 St.	450.00
Patrick Reilly,	118 East 89 st.
Knight & De Micco,	4441 Park Ave.
C. A. Crane,	51 Chambers.	350.00

O. K.

W. P. S.

The City of New York.

President of the Borough of Manhattan.

Offices, Commissioner of Public Works—Bureau of Highways.

Duplicate.

Requisition on Purchasing Agent.

Points of Delivery —.

The services or articles below enumerated are necessary for the transactions of the business of the above bureau.

Services or Articles desired:

Estimated
cost.

Furnish labor & material to construct a new sewer receiving basin due to change of grade & in accordance with attached plan & specifications for the sum of — at Kenmare St. and Cleveland Place.....

Approved by

Assistant Commissioner of Public Works.

48 I hereby certify that the services, repairs, or articles above specified are necessary for use in this division, and that they are to be used solely for the benefit of The City of New York and have not been heretofore ordered.

Chief Engineer of Highways.

Req. No. 1442. Order No. —.

Date Nov. 9 1914.

Appropriation or Fund and Line Number: Line No. C—
P. M.—37.

*Remodeling Receiving Basins.***Item 17.****Receiving Basins Remodeled—**

SEC. 17.1. Receiving Basins shall be remodeled in accordance with the standard plans and specifications on file in the Bureau of Highways, or as directed. Old material which is satisfactory may be used again.

Price to Cover—

SEC. 17.2. The price bid for remodeling Receiving Basins, Item 17.1, shall cover the cost of all necessary excavation and shall include

the cost of all labor and materials necessary to complete the basins, refilling to grade, and replacing the sidewalk.

Items 18 & 19.

Sluice Basins Built—

SEC. 18.1. Sluice basins shall be built in accordance with the standard plans and specifications for the same on file in the Bureau of Highways.

49 & 50 SEC. 18.2. The price bid for building sluice basins shall cover the cost of all necessary excavations and shall include the cost of all labor and material necessary to complete the basins, refilling to grade, and replacing the sidewalk.

Item 20.

Basin Connections—

SEC. 20.1. Connections between Sluice Basins and Receiving Basins, and between Receiving Basins and Sewers or Manholes shall be of 12 inch vitrified pipe, unless otherwise shown on plan, the pipes shall be of the same quality and dimensions, and laid in the same manner as specified in the specifications on file in the Bureau of Highways.

Measurements—

SEC. 20.2. The lengths of basin connections to be paid for will be determined by measurements along their axes.

Price to Cover—

SEC. 20.3. The price bid for basin connections shall cover the cost of all necessary excavation, whether earth or rock; of all necessary trimming, fitting and building into concrete or masonry; of all backfilling; of all embankments required; of all labor and materials required to furnish and lay the basin connections complete in place, as specified.

51

PEOPLE'S EXHIBIT NO. 2 IN EVIDENCE.

C. A. Crane,
51 Chambers Street.

Nov. 19th, 1914.

W. R. Patterson, Esq., Ass't Com. of Public Works, Municipal Building, New York City, N. Y.

DEAR SIR: I hereby agree to furnish all labor and material necessary for the construction of one (1) Sewer Receiving Basin, One (1) Type "B" Sluice Basin, and the necessary culvert for same, at the Northwest corner of Kenmare Street and Cleveland Place, for the

sum of Three Hundred and Fifty (\$350.00) Dollars. Time required six (6) days.

Yours truly,

C. A. CRANE.

PEOPLE'S EXHIBIT No. 3 IN EVIDENCE.

Indicate This Order Number on All Bills.

Open-market Order.

No. 3481. Date Nov. 23, 1914. Requisition No. 1442.

This original order to be attached to the voucher transmitted to Comptroller.

The City of New York.

A. M.

Highways.

President, Borough of Manhattan.

Messrs. C. A. Crane, 51 Chambers St., N. Y.:

Please furnish and deliver the following directly to N. W. Corner Kenmare St. and Cleveland Place.

All goods are to be billed at the prices agreed, which include delivery charges to place designated. Invoices in quadruplicate and in customary commercial form must accompany each delivery of goods or the goods will not be received. The Original Order, which is required to be attached to the voucher transmitted to the Comptroller, must accompany each completed delivery. In case of daily or weekly deliveries on monthly orders or partial deliveries for other reasons, the Comptroller's copy of this order must accompany the last delivery.

Line No.	Quantity.	Unit.	Description.	Price per unit.	Amount or estimate.	Exceptions.
52			Furnish labor and material to construct a new sewer receiving basin due to change of grade, and in accordance with attached plan and specifications at N. W. Kenmare Street and Cleveland Place, for the sum of three hundred and fifty dollars.....		\$350.00	

To be done to the satisfaction of the President, Borough of Manhattan.

I certify to the necessity of the above work or supplies, and that the expenditure therefor has been duly authorized and appropriated.

A certificate of the necessity of the above expenditure was placed on file in this Department before the expenditure was incurred.
4331.

W. R. PATTERSON,
Assistant Commissioner of Public Works.

I hereby certify that the articles or services above specified
53 have been received or performed, and that the quantity and quality thereof has been verified, with the exceptions noted on the margin.

— — — — —
This Original Order Must be Returned by Vendor with the Goods.
It is then to be signed by person to whom goods were delivered, and transmitted with Invoices at once to Central Office.

C. P. M. 37—Repaving Street, Borough of Manhattan—Section 160, Chapter 878, Laws of 1897, as amended by Chapter 563, Laws of 1902.

54 *Notice of Appeal to Court of Appeals.*

New York Supreme Court, Appellate Division, First Department.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant,
against
CLARENCE A. CRANE, Defendant-Respondent.

SIR: Please take notice that the People of the State of New York hereby appeal to the Court of Appeals from the judgment and order of the Appellate Division of the Supreme Court in and for the First Judicial Department rendered on December 31, 1914, in the above-entitled action and entered in the office of the Clerk of said Appellate Division, reversing a judgment of conviction of a misdemeanor rendered against the defendant in the Court of Special Sessions, First Division, City of New York, on December 9, 1914; and the said People of the State of New York appeal from each and every part of said judgment and order.

Dated, New York, January 4, 1915.

Yours etc.,

CHARLES ALBERT PERKINS,
District Attorney, New York County.

55 To Edward M. Grout, Esq., Attorney for Defendant-Respondent, 115 Broadway, New York City.

John P. Hilly, Esq., Clerk of the Court of Special Sessions, First Division, City of New York.

Order of Reversal Appealed from.

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York, on the 31st Day of December, 1914.

Present:

Hon. George L. Ingraham, Presiding Justice.

" Chester B. McLaughlin,

" Francis M. Scott,

" Victor J. Dowling,

" Henry D. Hotchkiss,

Justices.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
against

CLARENCE A. CRANE, Defendant-Appellant.

56 An appeal having been taken to this Court by the defendant from a judgment of conviction of a misdemeanor rendered against him in the Court of Special Sessions, First Division, City of New York, and entered on the ninth day of December, 1914; and said appeal having been argued by Mr. Edward M. Grout of counsel for the appellant and by Mr. Robert S. Johnstone, Assistant District Attorney, of counsel for the respondent; and due deliberation having been had thereon, it is hereby unanimously

Ordered and adjudged that the judgment so appealed from be and the same is hereby reversed and the defendant discharged, and said judgment is reversed solely for errors of law and not for errors or questions of fact or as a matter of discretion; this court, having reviewed and considered all questions of fact, found no error therein.

57 *Order Allowing Appeal to Court of Appeals.*

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department, in the County of New York, on the 4th Day of January, 1915.

Present:

Hon. George L. Ingraham, Presiding Justice.

" Chester B. McLaughlin,

" Francis M. Scott,

" Victor J. Dowling,

" Henry D. Hotchkiss,

Justices.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
against

CLARENCE A. CRANE, Defendant-Appellant.

Upon the record and proceedings in the above-entitled action and the consent of the attorneys for the parties thereto, hereto annexed, 22

and on motion of the District Attorney of the County of New York, it is

Ordered that the People of the State of New York, the respondent above-named, have leave to appeal to the Court of Appeals from the judgment and order of this Court rendered December 31, 1914, reversing a judgment of conviction of a misdemeanor rendered against the defendant in the Court of Special Sessions, First Division, City of New York, on December 9, 1914; and such appeal to the Court of Appeals by the People of the State of New York is hereby allowed, and this Court hereby certifies that questions of law have arisen which, in its opinion, ought to be reviewed by the Court of Appeals.

59 *Opinions of Appellate Division.*

Supreme Court, Appellate Division, First Department, December, 1914.

George L. Ingraham, P. J.
Chester B. McLaughlin,
Francis M. Scott,
Victor J. Dowling,
Henry D. Hotchkiss,
JJ.

No. 6654.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
vs.
CLARENCE A. CRANE, Defendant-Appellant.

No. 6655.

WILLIAM HEIM
vs.

EDWARD E. MCCALL et al., etc., Defendants-Respondents; CRANFORD COMPANY et al., Defendants-Appellants.

Appeal from Judgment of Conviction for a Misdemeanor, and Also Appeal from a Judgment Overruling a Demurrer to the Complaint in a Civil Action.

60 Edward M. Grout, for appellant Clarence A. Crane.
Robert S. Johnstone, for respondent People of the State.
Thomas F. Conway, for appellant Heim.
Edward M. Grout, for appellants Cranford Company et al.
George S. Coleman, for respondents Public Service Commission.
Jeremiah A. O'Leary, for John Gill, amicus curiæ.

SCOTT, J.:

Both of these appeals call in question the validity of the same statute. They were argued at the same time and can be conven-

iently considered together. The statute to which our consideration is thus invited is that portion of section 14 of the Labor Law which reads as follows: "In the construction of public works by the State or a Municipality or by persons contracting with the State or such Municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public work, preference shall be given citizens of the State of New York." A violation of this act is made a misdemeanor, and it — provided that in all contracts for the construction of public works a provision shall be inserted to the effect that, if the provisions of this section are not complied with, the contract shall be void.

The appellant Clarence A. Crane was convicted of a misdemeanor for violation of the Statute in that he employed aliens as laborers in the performance of a contract executed by the President of the Borough of Manhattan for the construction of a catch basin in connection with the public sewer system. The appellant William E. Heim sues as a Taxpayer to restrain the Public Service Commission, First District, from forfeiting or declaring void a large number of contracts, now in course of performance, for the construction of the Rapid Transit Subways in the City of New York, because of the employment (which is admitted) of laborers who are not citizens of the United States, and who are not citizens of the State of New York. As justification for his actions this appellant alleges that the forfeiture of these contracts would result in irreparable loss and damage to the City of New York and the Taxpayers thereof, and he states at some length his reasons for this allegation. Certain contractors, holding contracts for the work referred to are made parties defendant, and while they do not appear to have served any pleadings, they unite in asking that relief be granted as demanded by the appellant Heim.

With regard to the last mentioned appeal we are not unmindful of the recent expressions of the Court of Appeals adverse to the maintenance of so called tax payers' actions to test the validity of legislative acts (*Schieffelin vs. Komfort*, 212 N. Y. 520). In the present case however this objection is not raised by the respondents, and since it is represented to us that the Matter is one of great public exigency, as to which all parties interested seems to desire a speedy determination, we have concluded to pass upon the appeal upon its merits.

The particular provision of the act above quoted which has been discussed at bar is that which forbids the employment by persons engaged in the performance of work, under contracts with the State or a Municipality, of any except citizens of the United States, and it is that feature of the act to which we shall direct our attention, and we shall commence our discussion by conceding, as is strongly urged upon us by the respondents, that the invalidity of an act of the legislature is not to be lightly declared, and that in order to find such an Act invalid upon Constitutional grounds some definite provision must be found in the fundamental and paramount law with which the questioned enactment is at variance.

The specific Constitutional provision which is claimed to have been violated by the act in question is that portion of the Fourteenth Amendment of the Constitution of the United States which reads as follows: "No state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." It is settled law that the amendment is not confined to the protection of citizens, but that its provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, or color or of nationality, and the promise of the equal protection of the laws is equivalent to a pledge of the protection of equal laws (*Yick Wo vs. Hopkins*, 118 U. S. 369). The rights thus secured to resident aliens, as well as to citizens, have been repeatedly held to extend to the right to contract, to pursue lawful callings, and to follow ordinary avocations, that no impediments should be interposed to the pursuits of any one, except such as are applied to the same pursuits by others under like circumstances (*Barbier vs. Connelly*, 113 U. S. 27). It was said by the same court in *Missouri vs. Lewis* (101 U. S. 22) that: "No person

63 or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class in the same place and under like circumstances," and again in *Hayes vs. Missouri* (120 U. S. 68): "The Fourteenth Amendment requires that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, shall be treated alike under like circumstances and considerations both in the privileges conferred and in the limitations imposed." Hence it may be said to be as firmly established as is any principle of Constitutional law that one of the purposes and effects of the Fourteenth Amendment of the Federal Constitution was to forbid discrimination by any state between citizen- and resident aliens, based solely upon the fact of lineage and non-alienage so far as concerns the right to enjoy life, liberty and the pursuit of happiness, and the equal protection of the laws. Among the rights guaranteed to every individual, is that of freely contracting to render service and perform labor. "The provisions of the State and of the Federal Constitutions protect every citizen in the right to pursue any lawful employment in a lawful manner. He enjoys the uttermost freedom to pursue his chosen pursuit and any arbitrary distinction against or deprivation of that freedom by the legislature is an invasion of the Constitutional guarantee" (*People vs. Williams*, 189 N. Y. 13).

That the statutory provision now under consideration is frankly and baldly discriminatory requires no argument to establish. It forbids the employment of aliens upon all public works within the State for no other reason than that they are aliens. On its face it appears to be directly in conflict with the Fourteenth Amendment,

64 but it is strenuously argued by the respondents that, for various reasons, it does not, in truth, conflict with the Constitutional prohibition.

Much stress is laid by all of the respondents upon the cases which have upheld laws restricting the hours of labor and prescribing the rate of wages to be paid on public work, of which *Atkin vs. State of Kansas* (191 U. S. 207), is the leading case. We have been referred to and have examined many cases in this and other States dealing with that question, but we find it unnecessary to cite or comment upon them here because they all rest upon quite different considerations from those which we understand to be controlling upon the precise question we are now discussing. In none of them was the question of discrimination involved in the sense in which it is involved here. This was clearly pointed out by Mr. Justice Harlan who wrote for the Court in *Aitkin vs. Kansas*, supra. He said: "Equally without any foundation upon which to rest is the proposition that the Kansas Statute denied to the defendant" (a contractor, not a laborer) "or to his employee the equal protection of the law. The rule of conduct prescribed by it applies alike to all who contract to do work in behalf of the State or of its Municipal sub-divisions, and alike to all employed to perform labor in such work."

So in *People ex rel. Rodgers v. Coler* (166 N. Y. 1) wherein the Court of Appeals considered a Statute of the State regulating the hours of labor and the rate of wages on public work, it is clearly pointed out that the question now under discussion was not involved and a grave doubt was expressed whether the provision of the Statute prohibiting alien labor on the public works of the state could be upheld, if attacked. The Court said: "It is not necessary to
65 inquire how far, if at all, the right of citizens of other States seeking employment here, or those of aliens who have come here to improve their condition and to earn an honest living are ignored or restricted by this statute. These questions have not been raised or argued, and we will only remark that it reverses the settled policy of this State from the earliest time. The policy of New York has always been to welcome not only the citizens of our sister states, but emigrants from abroad to equal participation in all the opportunities and advantages of its business life. If the policy indicated in the statute now under consideration had been formulated and carried into operation half a century earlier, it may be that the growth and progress of the State would not be the subject of so much pride or as gratifying to all the people as it is now."

Our conclusion upon this branch of the subject is that no support for the Act now under examination can be found in the cases which have upheld the laws restricting the hours of labor on public work, and fixing a minimum rate of pay. All of those cases rest upon considerations which are inapplicable to the present question.

It is sought to sustain the Act as an exercise by the State of the police power, that well organized but not easily defined power under which the State may and often does restrict the liberty of the individual for the safety and protection of the community. It is not easy, nor is it necessary to attempt to precisely define the scope and limitations of the police power, but it may be said generally to authorize such enactments as are deemed necessary for the protection

of society and to guard its morals, safety, health and good order, but it is well recognized that in order to justify an act as an exercise of

66 the police power there must appear to be some obvious and real connection between the terms of the enactment and some of the purposes for the attainment of which the police

power may be exercised. Consequently an Act which invades personal rights or private property cannot be justified under the police power unless there be some discernible relation between it and some legitimate object of police regulation. Whether or not any statute can be upheld as a valid exercise of the police power is also a proper subject for judicial inquiry. It was said in *Colon v. Lisk* (153 N. Y. 188): "The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations. In other words its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the Courts (*Lawton v. Steele*, 152 U. S. 133, 137). Whenever the Legislature passes an act which transcends the limits of the police power, it is the duty of the judiciary to pronounce it invalid, and to nullify the legislative attempt to invade the citizens' rights. (*People ex rel. Nechamus v. Warden*, 144 N. Y. 529, 535). That power must be exercised subject to the provisions of both Federal and State Constitutions. Laws passed in the exercise of it must tend towards the preservation of the lives, health, morals or welfare of the community, and the court must be enabled to see some clear and real connection between the assumed purpose of the law and the actual provisions thereof, and that the latter tend in some plain and appreciable manner towards the accomplishment of the objects for which the legislature may use this power (*Health Department v. Rector*, 145 N. Y. 32, 39)." It seems to be quite clear that the provision of the labor law now under consideration cannot be

67 upheld on this ground. As was said by Chief Judge Cullen in discussing a so-called "eight hour law." "It seems to me to be entirely clear that the Statute cannot be upheld as an exercise of the police power vested in the legislature. I should think the proposition too clear for debate, but, if this assertion be considered dogmatic, then I say that the question is settled by the decisions both of this court and the Supreme Court of the United States. While the field for the exercise of the police power, subject to which all property is possessed by the citizen and all his callings or vocations must be pursued, is very broad, so broad that no court has sought to define accurately its extent, still it is subject to recognized limitations." (*People v. The Orange County Road Construction Company*, 175 N. Y. 84-87).

In a later case the Court of Appeals, while sustaining the validity of an eight hour law, said: "We do not uphold the Labor Law as constitutional to the limited extent that we pass upon it at all, because it is authorized by the police power which belongs to the State, for we cannot see that it bears any reasonable relation to the public health, safety or morals" (*People ex rel. Williams, etc., vs. Metz*, 193 N. Y. 148-159). We too are unable to see how the public

health, safety or morals can be affected by the citizenship or alienage of laborers upon the subways, or upon other work of a similar character. It is true that in certain cases, and with reference to certain occupations, it has been held to be lawful, under the police power, to discriminate between citizens and aliens, but the very cases in which it has been so held, and the reasons given for so holding illustrate their inapplicability to the present case. Thus in *Commonwealth vs. Hana* (195 Mass. 262) an Act was upheld

68 that prohibited the issuance of peddlers' licenses to any persons except citizens or those who had declared their intention to become citizens. A similar act had been held unconstitutional in *Maine (State vs. Montgomery, 94 Maine 192)*. The Supreme Court of Massachusetts, however, sustained the act in that State on the ground that the legislature might have discovered a reason for passing the act because, "the business of peddling furnishes such opportunities for the practice of fraud that it is a proper subject for legislative regulation, and that such regulation has been practiced from early times both in Europe and America is shown at length by Mr. Justice Gray in *Ernest vs. Missouri, 156 U. S. 296*." In the course of its opinion the court quoted the Fourteenth Amendment and said: "It is decided that this provision applies to aliens as well as to citizens of the United States, and it is clear that a statute arbitrarily forbidding aliens to engage in ordinary kinds of business to earn their living would be unconstitutional and void."

So also statutes have frequently been upheld which discriminated in favor of citizens as against aliens in the matter of granting licenses to trade in liquor, but the relation of the liquor traffic to the health, morals and good order of the community is obvious and has been recognized from the earliest times, and this relation has been the reason given for the discrimination. It is quite true that classification is not necessarily unlawful discrimination, and that the State has broad powers of classification for the purposes of legislation, but to be lawful such classification must have some reasonable basis to rest upon and must not be arbitrary or capricious or founded on mere whim (*Peo. ex rel. Farrington vs. Mensching, 187 N. Y. 8-16; Gulf, Colorado & Santa Fe R'way vs. Ellis, 165 U. S. 150*).

69 It would certainly be anomalous and illogical to uphold on this ground a Statute or classification based upon the precise discrimination which is forbidden by the Fourteenth Amendment, and having no other discernible basis.

It is also sought to sustain the Act by drawing a supposed analogy between it and the numerous enactments, constitutional and legislative, which require that public officers shall be citizens. It is plain that there is no such analogy. Public officers are a part of the political structure of the State and there is a clear distinction between them and laborers, and an even more clear distinction between them and the laborers employed by an individual contractor, even when engaged upon public work.

It is also urged that the State has the right to determine with whom it will contract or permit its constituent sub-divisions to con-

tract, and has also the right to prescribe terms which such contracts shall contain. This is true, however, only if the terms prescribed are not such as violate the fundamental and paramount law to which even the State is subject.

It is also argued that since each of the contractors has signed the contracts containing the restrictive clause they cannot be heard to object to its enforcement. The contractors, however, are not the only persons to be affected. The alien laborers, for whose protection among others the Fourteenth Amendment was adopted, and who have come to this country relying upon its promise of equal opportunity, are vitally interested that its protection shall not be denied them. But even if we consider the contractors alone the argument fails. It appears upon the face of the contracts themselves that the restrictive clause was imported into them solely in obedience

70 to the requirements of the Labor Law. The rule in such cases is that the restrictive clause of the penalty provided for its violation both become inoperative if the Statute prescribing them is held to be invalid (*Home Ins. Co. vs. Morse*, 87 U. S. 445-458; *Peo. ex rel. Rodgers vs. Coler*, 166 N. Y. 1).

We have heard and considered various arguments dealing with the sociological aspects of the case, and others dealing with somewhat far fetched suppositions as to the dire results that might be expected from the employment of aliens in constructing the subways in case this Country should ever, unhappily, be engaged in war with some foreign Country. Such arguments, in our opinion, afford no assistance in the solution of what is purely a legal question.

Our conclusion therefore is that the provisions of Section 14 of the Labor Law quoted earlier in this opinion are violative of the Fourteenth Amendment of the Constitution of the United States and therefore void. Our attention has been called to the text of numerous treaties between the United States and foreign Countries which, as it is claimed, expressly forbid discriminating legislation of this character. In view of the conclusion we have reached upon the Constitutional question it is unnecessary to discuss any question arising under these treaties.

An interesting question has been raised as to whether or not the clause quoted from the Labor Law applies to the work of building subways for the Rapid Transit system in the City of New York. It seems to be conceded by all of the respondents that it would be incompetent for the legislature to impose upon private persons or corporations not engaged in performing public work, such restrictions as are attempted to be imposed upon the City of New

71 New York as an arm of the State. This assumption opens up a wide field for inquiry upon which we do not propose to enter, and it is not necessary to do so because the Act by its own terms is made applicable only to the construction of public works. The contention is that the construction of the subways is a private work undertaken by the City of New York in its proprietary character, and not a public work undertaken by the City as the alter ego of the State in its Sovereign capacity. It is quite true that generally speaking municipalities are considered as merely the creatures of the

State, and its auxiliaries for the purpose of local government. This view was elaborated in *Atkins vs. Kansas* supra. The City of New York however is different from many cities in this, that it possesses under its ancient charters and patents much private property which it holds not as a part of the sovereign, but as a proprietor, and there is a clear distinction between work undertaken by the City as the delegate of the State, and that undertaken by it in its private or corporate capacity, which it may undertake or not as it sees fit, and to undertake which it cannot be coerced by the Legislature. In the one case the City acts as a political sub-division of the State; in the other as a private and independent contractor. The building of the subway appears to fall within the latter class. The City's relation thereto has recently been stated by the Court of Appeals as follows: "Was the action of the City in building the subway governmental or proprietary in character? The City owns the subway, and it is a railroad corporation so far as the construction, operation and leasing thereof is concerned. It was not required, but simply permitted

72 to build and operate the road * * * in other words, the subway is a business enterprise of the City, through which money may be made or lost, the same as if it were owned by an ordinary railroad corporation. It is built by and belongs to the City as a proprietor and not as a sovereign." (*Matter Rapid Transit Commissioners*, 197 N. Y. at p. 96.) In view of this language there is much ground for saying that, even if the State could lawfully impose the test of citizenship upon employees of its own Contractors, and the contractors with the City engaged in what is properly State work, it has no more power to impose such a test upon persons employed in building a subway for the City, than it would have if the subways were being constructed by a private corporation or individual.

We do not consider it necessary to expand this opinion by a prolonged discussion of this interesting question since the conclusion at which we have arrived upon the other branch of the case necessitates a reversal of the judgments appealed from. The judgment of conviction against the defendant Crane will therefore be reversed and the defendant discharged.

The judgment sustaining the demurrer to the complaint of the appellant Heim will be reversed and the demurrer overruled with costs to said appellant in this Court and the Court below, and judgment directed for the relief demanded in the Complaint.

All Concur.

73 Supreme Court, Appellate Division, First Department,
December, 1914.

George L. Ingraham, P. J.; Chester B. McLaughlin, Francis M.
Scott, Victor J. Dowling, Henry D. Hotchkiss, JJ.

No. 6655.

WILLIAM HEIM, Plaintiff-Appellant,

vs.

EDWARD E. MCCALL et al., etc., Defendants-Respondents; CRANFORD
Co. et al., Defendants-Appellants.

INGRAHAM, P. J.:

I fully concur in the opinion of my Brother Scott that Section 14 of the Labor Law is a violation of both the Federal and State constitutions.

As to the second question raised, I do not think that this section of the Labor Law applies to contracts made by the City of New York to build the subways which are described in the complaint in this action. The question, it seems to me, is not whether the legislature had power to regulate the method by which the municipal corpora-

74 tion of the City of New York should carry on its work or make its contracts for the improvement of the property which it held as a proprietor or owner of such property, but whether the legislature has attempted to do so. The provision of Section 14 of the Labor Law is: "In the construction of public works, by the State or a municipality or persons contracting with the State or such municipality, only citizens of the United States shall be employed." This provision relates solely to the construction of public works, and in the construction of such public works the evident intention was to limit the power of the State or a municipality or any persons contracting with the State or municipality. It was conceded that the City of New York has large interest which it holds, not as public property in the sense which such property is held by the State or a municipal corporation for public purposes, but in a strictly proprietary right, and which it is authorized by the legislature to improve for the benefit of the City and to enable it to receive for the City the profits which will accrue from such improvements. Take the case of the docks and wharves that the City owns and has improved and rents to those engaged in the commerce of the port, and receiving for the use of the municipal corporation the rents or emoluments paid for their use. As to a contract to build such a dock or structure thereon, I think it could well be said that it was not a public work in which the City was engaged, but rather a private work for the benefit of the municipality, as distinct from a work for the benefit of the public at large. So as to many other contracts which the City is authorized to make for the improvement of its property and for the enhancement of its revenue. And it seems to me clear that

the building of these subways is within this class. The City is not building these subways for the benefit of the People of the State, but for the benefit of the municipal corporation, and it owns such subways, and they are operated not as public works but as the private property of the City. It is authorized to lease these subways when built to a private corporation. All the public are excluded from the subways or the benefits that flow from their construction and operation upon the payment of a fee charged, a percentage of which is paid to the City, and at the expiration of the term for which they are leased the property reverts absolutely to the City to be a part of its private property. Matter of Board of Rapid Transit Commissioners, 197 N. Y., 96.

It seems clear, therefore, that even assuming that the legislature had power to impose such an obligation upon the City of New York by limiting the prohibition to "public works", such limitation did not apply to work of the character described in the complaint in this action, and therefore the provision of this section of the Labor Law did not apply to the City of New York when building a subway or railroad as a business enterprise of the City.

McLaughlin, J., Concur.

76

Clerk's Certificate.

I, John P. Hilly, Clerk of the Court of Special Sessions of the City of New York, do hereby certify that the foregoing is a true and correct copy of the remittitur of the Appellate Division, Supreme Court, First Department, in the case of People of the State of New York against Clarence A. Crane, and of the notice of appeal to the Court of Appeals in said case, now on file in the office of the Clerk of said Court of Special Sessions, and that the same have been compared by me with the originals thereof and are full, true and correct copies of said originals.

Dated, New York, January 9th, 1915.

[SEAL.]

JOHN P. HILLY,

*Clerk of the Court of Special Sessions
of the City of New York.*

77 STATE OF NEW YORK, COUNTY OF NEW YORK,
*Clerk's Office of the Court of Special Sessions
of the City of New York, ss:*

I, John P. Hilly, Clerk of the Court of Special Sessions of the City of New York, do hereby certify that I have compared the annexed copy of appeal book of the case, People of The State of New York against Charles A. Crane, comparing the following papers, to wit:

Statement, Notice of Appeal of defendant to the Appellate Division of the Supreme Court, First Department, Extract from Minutes of the Court of Special Sessions of the First Division of the City of New York, Information, Deposition before Magistrate, Warrant, Affidavit of Edward M. Ward, Affidavit of Frank La Mana, Affidavit of Alesandro Treets, Affidavit of Joseph Passanetto; Transcript of

the stenographer's minutes of the trial, including exhibits; Order filing record in the office of the Clerk of the Appellate Division of the Supreme Court for the First Judicial Department; Stipulation as to the evidence; Certificate of the Clerk of Special Sessions; Affidavit of no opinion; Notice of appeal to the Court of Appeals; Order of reversal of the judgment of conviction by the Appellate Division of the Supreme Court for the First Judicial Department; Order allowing appeal to the Court of Appeals; Opinions of the Appellate Division of the Supreme Court for the First Judicial Department; Certificate of the Clerk of Special Sessions of the Record to the Court of Appeals, and Remittitur of the Court of Appeals, and the endorsements thereupon, with the original thereof on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, in the Borough of Manhattan, City and
78 County of New York, this 6th day of March, 1915.

[Seal Court of Special Sessions of the City of New York.]

[SEAL.]

JOHN P. HILLY,
*Clerk of the Court of Special Sessions
of the City of New York.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 3/6/15. E. F. N.]

79 STATE OF NEW YORK, COUNTY OF NEW YORK,
*Clerk's Office of the Court of Special Sessions
of the City of New York, ss:*

I, John P. Hilly, Clerk of the Court of Special Sessions of the City of New York, do hereby certify that I have compared the annexed copy of opinions of the Court of Appeals with the originals thereof in file in this office, and that the same are correct transcripts therefrom, and of the whole of said originals.

In witness whereof, I have hereunto set my hand, and affixed the seal of said court in the Borough of Manhattan, City and County of New York, this 6th day of March, 1915.

[Seal Court of Special Sessions of the City of New York.]

[SEAL.]

JOHN P. HILLY,
*Clerk of the Court of Special Sessions
of the City of New York.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 3/6/15. E. F. N.]

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Opinion of Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant,

v.

CLARENCE A. CRANE, Respondent.

(Decided February 25, 1915.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 31, 1914, which reversed, solely for errors of law, a judgment of the Court of Special Sessions of the City of New York, convicting the defendant of a misdemeanor for violation of section 14 of the Labor Law of the State.

The facts, so far as material, are stated in the opinion.

Charles Albert Perkins, District Attorney (Robert S. Johnstone of counsel), for appellant.

Edward M. Grout for respondent.

Jeremiah A. O'Leary as amicus curiæ.

CARDOZO, J.:

The defendant is a contractor with the city of New York. His contract was for the construction of sewer basins. In doing the work, he employed laborers not citizens of the United States. One of them was an Italian. The nationality of the others is not shown. Because of the employment of these aliens, he has been convicted of violating section 14 of the Labor Law (L. 1909, ch. 36, Cons. Laws, ch. 31). The section reads as follows:

"SECTION 14. Preference in employment of persons upon public works. In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the state of New York. In each contract for the construction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void. All boards, officers, agents or employees of cities of the first class of the state, having the power to enter into contracts which provide for the expenditure of public money on public works, shall file in the office of the commissioner of labor the names and addresses of all contractors holding contracts with said cities of the state. Upon the letting of new contracts the names and addresses of such new contractors shall likewise be filed. Upon the demand of the commissioner of labor a contractor shall furnish a list of the names and addresses of all subcontractors in his employ. Each contractor performing work for any city of the first class shall keep a list of his employees, in which it shall be set forth whether they are naturalized or native born citizens of

81 the United States, together with, in case of naturalization, the date of naturalization and the name of the court where such naturalization was granted. Such lists and records shall be open to the inspection of the commissioner of labor. A violation of this section shall constitute a misdemeanor and shall be punishable by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment for not less than thirty nor more than ninety days, or by both such fine and imprisonment."

The Appellate Division has held that this statute violates both the State and Federal Constitution. Its effect, we are told, is to deprive the excluded aliens of their liberty without due process of law, in that they are denied the right to labor on the public works. (Federal Const. 14th Amendment; State Const. art. 1, sec. 6.) The effect also is, we are told, to deny to the excluded aliens the equal protection of the laws. (Federal Const. 14th Amendment.) It is true the defendant is not within the excluded classes. (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 545.) He is charged, however, with a crime, and the crime is said to have been the refusal to discriminate, and nothing else. The laborers whom he has employed are within the excluded classes; and if they had a right to serve, he on his side had a right to employ. To refuse to give effect to an unlawful discrimination, and to do this at the instance of those against whom the discrimination is aimed, cannot constitute a crime. The question whether this statute does discriminate against aliens in violation of the Constitution is, therefore, we think, before us.

The moneys of the state belong to the people of the state. They do not belong to aliens. The state, through its legislature, has given notice to its agents, that in building its public works, it wishes its own moneys to be paid to its own citizens, and if not to them, then, at least, to citizens of the United States. The argument is made that in thus preferring its own citizens in the distribution of its own wealth, it denies to the alien within its borders the equal protection of the laws.

The people, viewed as an organized unit, constitute the state (*Penhallow v. Doane's Adm.*, 3 Dallas, 54, 100; *Texas v. White*, 7 Wall. 700, 720.) The members of the state are its citizens. (*United States v. Cruikshank*, 92 U. S. 542, 549; *Minor v. Happersett*, 21 Wall. 162.) Those who are not citizens, are not members of the state. Society thus organized, is conceived of as a body corporate. Like any other body corporate, it may enter into contracts, and hold and dispose of property. In doing this, it acts through agencies of government. These agencies, when contracting for the state, or expending the state's moneys, are trustees for the people of the state. (*Illinois v. Illinois Central R. R. Co.*, 146 U. S. 387.) It is the people, i. e., the members of the state, who are contracting or expending their own moneys through agencies of their own

82 creation. Certain limitations on the powers of those agencies result from the nature of the trust. (*Illinois v. Illinois Central R. R. Co.*, supra.) Since government, in expending public moneys, is expending the moneys of its citizens, it may not by ar-

bitrary discriminations having no relations to the public welfare, foster the employment of one class of its citizens and discourage the employment of others. It is not fettered, of course, by any rule of absolute equality; the public welfare may at times be bound up with the welfare of a class; but public welfare, in a large sense, must, none the less, be the end in view. Every citizen has a like interest in the application of the public wealth to the common good, and the like right to demand that there be nothing of partiality, nothing of merely selfish favoritism, in the administration of the trust. But an alien has no such interest, and hence results a difference in the measure of his right. To disqualify citizens from employment on the public works is not only discrimination, but arbitrary discrimination. To disqualify aliens is discrimination indeed but not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful.

The power of a state to discriminate between citizens and aliens in the distribution of its own resources is sanctioned alike by decisions of the courts and by long-continued practice. Neither aliens nor the citizens of other states are invested by the Constitution with any interest in the common property of the people of this state. (*McCready v. Virginia*, 94 U. S. 391, 394.) It has been held, therefore, that a state may deny to aliens, and even to citizens of another state, the right to plant oysters or to fish in public waters. (*McCready v. Virginia*, *supra*; *People v. Lowndes*, 130 N. Y. 455, 462; *Commonwealth v. Hilton*, 174 Mass. 29.) It may restrict to its own citizens the enjoyment of its game. (*Geer v. Connecticut*, 161 U. S. 519, 529; *Patson v. Pennsylvania*, 232 U. S. 138, 145.) It may discriminate between citizens and aliens in its charitable institutions, or in other measures for the relief of paupers. (*Freund on the Police Power*, sec. 712; *State Charities Law* [L. 1909, chap. 57], sec. 17.) It may make the same discrimination in the distribution of its public lands (*McCready v. Virginia*, *supra*); its mines (*Justice Mining Co. v. Lee*, 21 Colo. 260); its forests, or other natural resources. It may deny to aliens the right to hold or inherit real estate, except where the right has been secured by treaty. (*Blythe v. Hinckley*, 180 U. S. 333, 341.) The origin of this last disability is historical (1 *Pollock & Maitland History of English Law*, 445), but the policy underlying it is akin to the policy that underlies the others. The principle that justifies these discriminations is that the common property of the state belongs to the people of the state, and hence that, in any distribution of that property, the citizen may be preferred.

To defeat this law it must, therefore, be held that the Constitution gives to the state a narrower liberty of choice in the expenditure of its own moneys than in the use or distribution of its other resources. I can find no justification for the supposed distinction. The construction of public works involves the expenditure of public moneys. To better the condition of its own citizens, and it may be to prevent pauperism among them, the legislature has declared that

the moneys of the state shall go to the people of the state. The equal protection of the laws is due to aliens as to citizens (*Yick Wo v. Hopkins*, 118 U. S. 356, 369; *Lem Moon Sing v. United States*, 158 U. S. 538, 547); but equal protection does not mean that those who have no interest in the common property of the state, must share in that property on the same terms as those who have an interest.

In saying this, I assume that the purpose of the statute is not to promote efficiency in the doing of the work, but to discriminate in the distribution of the public wealth in favor of the citizen. There may be forms of employment where efficiency would be promoted by the employment of citizens, and if the statute were restricted to such employments, its validity would not be doubtful. Just as the state may confine to citizens the right to hold public office, so, on the same ground, it may confine to citizens the right to serve the state in any way, whenever there is a relation between the exclusion of aliens and the promotion of efficiency. There are many lines of service where it is conceivable that the employment of citizens will make for a stable administration. If the government were to take over the railroads, there would be force in the argument that the trains should be run by citizens on whose loyalty the government might depend in times of national disaster. We have grown accustomed to the government's administration of the mails, and none of us doubts that the service is one from which aliens may be excluded. In all these branches of employment, it is not difficult to discover some relation between citizenship and efficiency. The prohibition of alien labor in this statute is, however, unrestricted. It applies to the most temporary and occasional service, and to the lowest grades of labor. Even in those cases, it is for the legislature, according to the People's claim, to determine whether some relation exists between efficiency and citizenship; between loyalty in service, and service by the loyal. Such tests of fitness have a fair relation to permanent positions where a spirit of allegiance to the employer may be cultivated. It seems far fetched, however, to apply them to the task of day laborers excavating for sewers

84 or digging trenches for a subway. The relation in such circumstances is so remote that we may consider it illusory. At least, I shall so assume for the purpose of this discussion. The statute has been frankly defended at our bar as a legitimate preference of citizens, not to promote the efficiency of the work, but to promote the welfare of the men preferred; and from that aspect, it will be frankest and safest for us to view it.

To concede that such a preference was intended, is not to condemn the statute as invalid. The state in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens rather than that of aliens. Whatever is a privilege rather than a right, may be made dependent upon citizenship. In its war against poverty, the state is not required to dedicate its own resources to citizens and aliens alike. "The relief of the poor, the care of those who are unable to care for themselves, is among the unquestioned objects of public duty." (*Brewer, J., in State v.*

Osawkee T. P., 14 Kan. 424.) The modern state everywhere is mindful of that duty. It has extended its bounty in large measure, though not without some discrimination, to aliens; but it would not trench upon their rights under the Constitution if it were to confine its bounty to its citizens. As it may discriminate between citizens and aliens in relief, so also it may discriminate in employment. When payment for public works is to be made from public funds, it may prefer in employment its own citizens, since to them the legislature may believe that the first duty is owing. (United States v. Realty Co., 163 U. S. 427, 440.) Everywhere throughout the world the state, in its relation to the laborer, is assuming a larger obligation; but it cannot be that it owes this obligation to citizens and aliens in equal measure. In Great Britain there was enacted in 1905 a statute providing for old age pensions, restricted, it may be noted, to British subjects. (8 Edw. 7, chap. 40, sec. 1.) In the same kingdom there was enacted in 1911 a statute providing for insurance against unemployment. (1 & 2 George 5, chap. 55.) In our own country the workmen's compensation laws that have been adopted in many states are phases of the same world-wide movement. We are not concerned at this time with the validity of these measures for the alleviation of the laborer's lot. We mention them as illustrations of an expanding consciousness in the modern state that relief against unemployment, both after the event and before it, is part of the state's function. In one of our states the courts have sustained a law providing for state help to farmers. (North Dakota v. Nelson Co., 1 N. D. 88.) How far the state will go beyond its own citizens in thus applying its own resources for the betterment of conditions the legislature must say. Preferences to relieve against pauperism after it has become an accomplished fact do not violate the rights of aliens. Preferences to avert a threatened pauperism, or to render pauperism impossible, stand on the same footing. In each instance the state announces as its public policy that the common property shall be used for the benefit of its common owners.

The argument is made, however, that there is a distinction between the right of government to exclude aliens from its own employment and the right to exclude aliens from employment by independent contractors. The ruling of the Supreme Court of the United States in *Atkin v. Kansas* (191 U. S. 207), and in *Ellis v. United States* (206 U. S. 246) goes far to invalidate the distinction. The first case considered a statute of Kansas prohibiting the employment of laborers for more than eight hours a day on any public work. The statute was held valid in its application to laborers in the service of contractors. The second case sustained a like statute, passed by Congress, to regulate employment on public works in the District of Columbia. The presence of an independent contractor, interposed between the state and the laborer, did not check the power of the government to prescribe the hours of labor. But without reference to those decisions, the distinction is inadequate. In a real and substantial sense, it is the money of the state that is paid to the laborers, though the distribution is made through the medium of contractors.

That money constitutes the fund out of which the wages of laborers are payable. This is not only true as an economic and social fact. It is true also as a statement of the legal rights of those concerned. The state (Lien Law [L. 1909, ch. 38], sec. 5) has given to any laborer employed by a contractor in the construction of a public improvement, a lien for the value of his labor upon the moneys of the state applicable to that improvement. The state has thus defined the channels through which the payment must be made. It has assumed a direct obligation not only to its own employees, but also to the employees of contractors on its works. To say that the latter class of employees receive, not the state's moneys, but those of the contractors, is to put form above substance. The great problems of public law do not turn upon these nice distinctions. The fundamental powers of the state and the fundamental rights of man are built upon a broader basis. The truth and substance of the situation is that the contractor's employees are doing the state's work, and are paid out of the state's moneys; and this truth ought not to be obscured by distinctions between contractors and servants established to fix the gradations of civil liability.

I do not ignore what was said in *People v. Orange County Road Construction Co.* (175 N. Y. 84). There is a suggestion in that case, but not a ruling, that a distinction exists between 86 employees of the state and those of a contractor in respect of the state's power to regulate the hours of labor. The later case of *Atkin v. Kansas* (191 U. S. 207) has obliterated the distinction, and so it was conceded in *People ex Rel. Cossey v. Grout* (179 N. Y. 417). It is now perceived that all persons engaged on the public works, from the highest officers to the lowest laborers, through all the gradations of contractors and subcontractors, are, in a very vital sense, in the service of the state. The state has a legitimate concern in the selection of the men to be employed from one extreme of the official hierarchy to the other. Whether they are called officers or employees does not matter. The power of the legislature depends upon the substance of things, and not upon names and labels.

To hold that this statute violates the Federal Constitution would be to ignore the contrary judgment expressed in the Constitutions and legislation of many other states. There is a like provision in the Constitution of Arizona (Art. 18, sec. 10), a Constitution which was approved (so far as this provision is concerned) by joint resolution of Congress (37 U. S. Stat. at Large, p. 39). There are like provisions in the Constitution of Idaho (Art. 13, sec. 5), and in that of Wyoming (Art. 19, § 1), which were also approved by Congress. There is a like provision, restricted, however, to Chinese, in the Constitution of California (Art. 19, sec. 3). There are like provisions applicable to all aliens in the statutes of Massachusetts (Acts of 1909, chap. 514, sec. 21), New Jersey (Compiled Statutes of New Jersey, 1910, p. 3023, sec. 15), Pennsylvania (Purdon's Digest [13th ed.], vol. 2, p. 2172, sec. 8), and California (California Code, 1906, Act No. 127, General Laws of California). Legislation similar in purpose may be found in Montana (Revised Code,

sec. 2250), Nevada (Revised Laws of Nevada, 1912, sec. 3483), Oregon (Laws of Oregon, sec. 6267) and Hawaii (Acts of Congress, Revised Laws 1905). Unless the case against this statute is a clear one, the courts may not ignore this concurrence of opinion. (*Lemieux v. Young*, 211 U. S. 489, 493.)

In thus holding that the power exists to exclude aliens from employment on the public works, we do not, however, commit ourselves to the view that the power exists to make arbitrary distinctions between citizens. We do not hold that the government may create a privileged caste among the members of the state. (*Smith v. Texas*, 233 U. S. 630, 638.) We do not hold that it may discriminate among its citizens on the ground of faith or color. (*Strauder v. West Virginia*, 100 U. S. 303; *Gibson v. Mississippi*, 162 U. S. 565; *Rogers v. Alabama*, 192 U. S. 226, 231.) A citizen may not be disqualified because of faith or color from service as a juror.

(*Strauder v. West Virginia*, supra.) For like reasons we
87 assume that he may not be disqualified because of faith or color from serving the state in public office or employment.

It is true that the individual, though a citizen, has no legal right in any particular instance to be selected as contractor by the government. It does not follow, however, that he may be declared disqualified from service, unless the proscription bears some relation to the advancement of the public welfare. (*Strauder v. West Virginia*, supra, at page 305.) The legislature has unquestionably the widest latitude of judgment in determining whether such a relation exists, but we are not required to hold that there is no remedy against sheer oppression. Where the line must be drawn, we do not now determine. We do not say that the legislature could single out A and B by name, and declare that, though citizens, they should never be employed on any public work. It may well be that such disqualification would be illegal under the Fourteenth Amendment of the Federal Constitution, in that it would deny to the citizens thus arbitrarily excluded the equal protection of the laws, and illegal also under our State Constitution, which provides (Art. 1, sec. 1): "No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." This opinion has failed of its purpose if it has failed to demonstrate that those provisions are without application to the exclusion of aliens from the enjoyment of the state's resources.

It must also be evident that nothing in this opinion gives countenance to the view that the government may deny to aliens the right to engage in any private trade or calling on terms of equality with citizens. (*Yick Wo v. Hopkins*, 118 U. S. 356, 369; *Matter of Parrott*, 1 Fed. Rep. 481.) If the calling is one that the state, in the exercise of its police power, may prohibit either absolutely, or conditionally by the exaction of a license, the fact of alienage may justify a denial of the privilege. (*Patone v. Pennsylvania*, 232 U. S. 138; *Comm. v. Patone*, 231 Penn. St. 46; *Comm. v. Hana*, 195 Mass. 262; *Bloomfield v. State*, 86 Ohio St. 253; *State v. Travelers Ins. Co.*, 70 Conn. 590, 600.) There must, however, be

some relation in such case between the exclusion of the alien and the protection of the public welfare. But subject only to the exercise of the police power, it is true that in dealings between man and man, the alien and the citizen trade and labor on equal terms. It is a denial of the equal protection of the laws when the government, in its capacity as a lawmaker, regulating, not its own property, but private business, bars the alien from the right to trade and labor. It is not a denial of the equal protection of the laws when the government, in its capacity as proprietor, issuing a mandate to its own agents (United States v. Martin, 94 U. S. 400; Carter, Law, its Origin, Growth and Functions, p. 230), bars the alien from 88 the right to share in the property which it holds for its own citizens.

Because the state may thus discriminate in favor of the citizen in regulating employment on its public works, it does not follow, however, that it may exclude aliens from the enjoyment of those works after they have been completed. Aliens may use the public highways as freely as citizens. Aliens may use the railroads and other agencies of transportation as freely as citizens. The reason is that the right to move about from place to place within the state is incidental to the right to live within the state. There are probably many other public works so intimately related, if not to life, at least to health and comfort, that merely arbitrary or oppressive discrimination against the alien in regulating their use, would be a denial by the state of the equal protection of the laws. To attempt to draw the line in advance is futile. The question must in each case be whether the use is one that is reasonably incidental to life under modern conditions in a civilized state, or whether it is rather a privilege which the state may grant or may withhold. To be employed by the state on the public works, and to receive payment out of the public purse is, I think, a privilege rather than a right. (Atkin v. Kansas, *supra*, at p. 223.)

The argument is made that if the statute is not invalid as in conflict with the Fourteenth Amendment of the Constitution, it is invalid as in conflict with treaties between the United States and foreign nations. Typical of these treaties is the one with Italy. It provides: "The citizens of each of the high contracting parties shall have liberty to travel in the States and Territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incidental to, or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established. The citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are, or shall be, granted to the natives, on their submitting themselves to the conditions imposed upon the natives." This treaty, in my judgment, does not limit the power of the state, as a proprietor, to control the construction of its own works and the distribution of its own moneys.

The argument is also made that discrimination between citizens and aliens may increase the cost of public works by limiting the supply of labor; and that to do this, in order to better the condition of our laborers, is to violate restrictions of the Constitution of the state. Article VIII, section 9, of the State Constitution provides that "neither the credit nor the money of the State shall be given or loaned to or in aid of any association, corporation or private undertaking." Article VIII, section 10, provides, "No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation; nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes. This section shall not prevent such county, city, town or village from making such provision for the aid or support of its poor as may be authorized by law." The money that goes to laborers on public works is not given or loaned in aid of individuals within the meaning of these provisions. It is paid for service rendered. That is the direct and primary purpose of the payment. The primary and direct purpose being legal, the payment does not become illegal because a collateral and secondary purpose may be to protect a large class of the community against the peril of pauperism. In the long run, the payment may be found to have lessened the public burdens rather than to have increased them. (*Noble State Bank v. Haskell*, 219 U. S. 104, 110, 111.) The same argument was made against the validity of the statute for an eight-hour day. It was said that the result would be to increase the cost for the benefit of favored classes. The legislature is now empowered by the Constitution to fix the wages and salaries of all employees upon the public works. This authority embraces the direct increase of expense by increasing salaries beyond the minimum fixed by competition. It must also embrace the indirect increase of expense by regulations of employment tending to diminish competition.

I have not overlooked, though I have not attempted to analyze, the decisions of this court in which the statutes governing the hours of labor on public works were the subject of discussion. (*People ex rel. Rodgers v. Coler*, 166 N. Y. 1; *People v. Orange County Road Construction Co.*, 175 N. Y. 84; *Ryan v. City of New York*, 177 N. Y. 271; *People ex rel. Cossey v. Grout*, 179 N. Y. 417.) The specific proposition there decided has ceased to be law in this state. So far as it was founded on the theory of a conflict between the statute and the Federal Constitution it was overruled by the United States Supreme Court in *Atkin v. Kansas* (191 U. S. 207). So far as it was founded on the theory of a conflict between the statute and the Constitution of this state it was superseded by the amendment of the Constitution in 1905. (Const. art. 12, sec. 9; *People ex rel. Williams E. & C. Co. v. Metz*, 193 N. Y. 148.) The earlier cases are no longer authorities, therefore, for any proposition actually decided. Their reasoning may still instruct, but no longer control us. They were decided in nearly every in-

stance by a bare majority. In at least one instance a majority did not unite in anything more than the result. It would serve no useful purpose to review the varying opinions at this time. It is enough to say that they are not decisive of the case at hand.

This statute must be obeyed unless it is in conflict with some command of the Constitution, either of the state or of the nation. It is not enough that it may seem to us to be impolitic or even oppressive. It is not enough that in its making, great and historic traditions of generosity have been ignored. We do not assume to pass judgment upon the wisdom of the legislature. Our duty is done when we ascertain that it has kept within its power. (*Bertholf v. O'Reilly*, 74 N. Y. 509, 515; *People v. Gillson*, 109 N. Y. 389, 398; *Atkin v. Kansas supra.*) "It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." (Holmes, J., in *Missouri, Kansas & Texas Ry. Co. v. May*, 194 U. S. 267, 270.) If doubt exists whether there is a conflict between the statute and the Constitution, the statute must prevail. (*Barrett v. Indiana*, 229 U. S. 26, 31; *People v. Gillson, supra.*) These guiding principles are not to be honored by lip service only. Mischief and hardship, it is said, will follow the enforcement of this law. If that is so, we cannot help it. To correct those evils, if they shall develop, will be the province of legislation. The statute does not withhold from the alien the rights secured to him by the Constitution; and we must enforce it as the law.

The judgment of the Appellate Division should be reversed, and the judgment of conviction affirmed.

WILLARD BARTLETT, *Ch. J.* (concurring):

Whatever may be my own views as to the wisdom or fairness of the statute before us, I am entirely clear that it is constitutional and that the question is settled by the decision both of the United States Supreme Court and of this court.

These decisions establish the proposition that the state in the prosecution of a public work stands in just the same position as an individual; that it may prescribe the conditions on which it will contract for such work; and that it may make the violation of his contract on the part of the contractor a criminal offense. It is so held in *Atkin v. Kansas* (191 U. S. 207, 223) where the Supreme Court of the United States said that "no employee is entitled, of absolute right and as a part of his liberty, to perform labor for the state; and no contractor for public work can excuse a violation of his agreement

with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do." This language was quoted with approval by this court in *People ex rel. Williams Eng. & Contr. Co. v. Metz* (193 N. Y. 148) and the doctrine therein declared thus received the sanction of all the judges who sat in that case.

In *Ellis v. United States* (206 U. S. 246, 256), which involved the validity of a Federal labor law, it was held that "the government purely as a contractor, in the absence of special laws, may stand like a private person, but by making a contract it does not give up its

power to make a law;" and in the exercise of this power it may declare a violation of his contract by the contractor to be a crime. In answer to a suggestion that the purpose of the statute was to secure to labor certain advantages in conditions over which Congress has not general control, Mr. Justice Holmes said that the existence of such a motive would not render a law unconstitutional which was otherwise valid and that the power which Congress has over the mode in which contracts with the United States shall be performed could not be limited by a speculation as to motives.

However subsequent legislation or adjudications may have modified the effect of the decision in *People v. Orange County Road Construction Co.* (175 N. Y. 84, 90) it still remains true, as was said by Judge Cullen in that case, that "if the state itself prosecutes a work it may dictate every detail of the service required in its performance; prescribe the wages of workmen, their hours of labor, and the particular individuals who may be employed. * * * The state in this respect stands the same as its citizens."

How great the rights of private citizens are in their status as employers is aptly illustrated by *Jacobs v. Cohen* (183 N. Y. 207) where this court held that the contract between an employer and a labor union whereby the employer agreed for a certain period to employ only members of the union was not violative of public policy or otherwise forbidden by law. In the opinion we reiterated the assertion made in *National Protective Association, etc., v. Cumming* (170 N. Y. 315, 341) that every man has a right "to carry on his business in any lawful way that he sees fit. He may employ such men as he pleases and is not obliged to employ those who, for any reason, he does not wish have work for him."

It seems to me that the only constitutional prohibition which can be relied upon with any confidence to invalidate the statute forbidding the employment of aliens upon the public works of this state, is the provision of the Fourteenth Amendment to the Federal Constitution which declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

If it is a denial of the equal protection of the laws for an employer of labor to refuse to afford a designated class of persons an opportunity to work for him, it must be conceded that this statute was enacted in disregard of the constitutional provision thus invoked.

I can find no reason to suppose, however, that the Fourteenth Amendment was designed to limit or restrict the rights of a state as an employer of labor. Other employers, individual or corporate, possess the undoubted and absolute right to withhold employment from whomsoever they see fit. The Constitution could hardly have been intended to deprive the states of equality with private employers in this respect; yet if the Fourteenth Amendment invalidates the statute in question, the great railroad corporation which is erecting its new station in Albany to-day may refuse to allow aliens to work upon it, while the state of New York, in repairing the capitol, must give aliens an equal opportunity with citizens to aid in its reconstruction.

The statute is nothing more, in effect, than a resolve by an employer as to the character of his employees. An individual employer would communicate the resolve to his subordinates by written instructions or by word of mouth. The state, an incorporeal master, speaking through the legislature, communicates the resolve to its agents by enacting a statute. Either the private employer or the state can revoke the resolve at will. Entire liberty of action in these respects is essential unless the state is to be deprived of a right which has heretofore been deemed a constituent element of the relationship of master and servant, namely, the right of the master to say who his servants shall (and therefore shall not) be.

If the alien labor law under consideration is violative of the Fourteenth Amendment, the preference given to veterans by the Constitution of the state of New York must likewise be invalid. (Const. of New York, art. V. sec. 9.) Appointments and promotions in the civil service of the state and of all civil divisions thereof, including cities and villages, are thereby required to be made according to merit and fitness to be ascertained as far as practicable by examinations, which so far as practicable shall be competitive; "provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late civil war, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made." Here is a preference in the public service based wholly upon a status acquired half a century ago, and a preference of one class of citizens over all others. There could not be a clearer case of discrimination. I think that the Federal Constitution permits such discrimination; but I should not think so if it be held that the statute in question here is in conflict with the Fourteenth Amendment.

93 The differences of opinion upon the present appeal are necessarily radical and depend upon the question whether the denial of an opportunity to work for the state is a denial of the equal protection of the laws. For the reasons which I have briefly stated, in addition to those set forth so clearly and cogently in the opinion of my brother Cardozo, I think this question must be answered in the negative. I do not believe that either the Fourteenth Amendment or any other of the constitutional provisions relied upon by the respondent was designed to limit the right of the state to choose its own servants.

SEABURY, J. (concurring):

This case in no way involves the right of private citizens to employ aliens in private work. It presents only the question of the right of the state to exclude aliens from employment upon its public works. The distinction is vital and must be kept in mind throughout the discussion of this case.

I concur in the opinion that the statute is constitutional. I agree that, because of the public character of the work to which the statute relates, the discrimination against aliens is not an arbitrary dis-

crimination. I agree also that the law cannot be upheld upon the ground that it is designed to promote efficiency upon the public works of the state. The present case, as I view it, does not involve merely the right of the state to prescribe the manner in which its public money may be distributed. The money expended for public works would necessarily be expended whether citizens or aliens were engaged in constructing them. The money paid by the state for this purpose is not a gratuity, but is paid as compensation for services rendered and the rendering of these services creates a public value at least equal to the money expended. The distribution of public money for this purpose is only an incident of the state's exercise of its right as proprietor and owner of its public works. This case involves the right of the state as owner or proprietor to exclude aliens from working upon its public works and to accord to its own citizens a preference in being employed upon such public works, over other citizens of the United States. No citizen, as an incident of citizenship, has any right to be employed upon public works. If to be employed upon public works is in any sense a right or privilege under the State Constitution (Art. 1, sec. 1), it is equally so under the provisions of the Fourteenth Amendment to the Federal Constitution. Thus if the right to be employed on public works is a right or privilege incident to citizenship the state might discriminate against aliens, but it could not, under the provisions of the Federal Constitution, discriminate in favor of its own citizens against citizens of another state. Yet the state may discriminate as between its own citizens and citizens of a sister state, and even in favor of some of

its citizens and against others as to the use that shall be made
94 of its own property. (*People v. Lowndes*, 130 N. Y. 455;

Haney & Scattergood v. Compton, 36 N. J. L. 507; *Geer v. Connecticut*, 161 U. S. 519; *Corfield v. Coryell*, 6 Fed. Cas. 546; *Commonwealth v. Hilton*, 174 Mass. 29; *McCready v. Virginia*, 94 U. S. 391.) No citizen has any constitutional right or privilege to be employed upon public work, or any immunity against discrimination in this respect, either under article 1, section 1, of the Constitution of the state or under the Fourteenth Amendment to the Federal Constitution. The legislature has the right to prescribe who shall work upon its public works. Public works are public property. As such they belong wholly to the sovereign power of the state. The manner in which they shall be built is within the function of the sovereign power to prescribe. This regulation and control is a part of the police power of the state. The police power of the state is not limited to exerting control over private property to promote the general welfare. It is by virtue of this power that the state possesses the exclusive right to construct and control its public property. I am aware that objection has been made to the use of the term "police power" to include the regulation by the state of its internal affairs, on the ground that it uses the terminology that has often been associated with the regulation of private affairs external to the state. Notwithstanding this objection, the nature of the power exerted is the same, whether it is exercised over the public property of the state

itself or over the private property of the citizen. The highest judicial authority exists for applying the term "police power" to both public and private property. (New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; People v. Kerr, 27 N. Y. 188, 213; Haney & Scattergood v. Compton, 36 N. J. L. 507.) In New Orleans Gas Co. v. Louisiana Light Co. (115 U. S. 650, 661) the Supreme Court of the United States, speaking of the police power, said: "We may, not improperly, refer to that power the authority of the state to create educational and charitable institutions, and provide for the establishment, maintenance, and control of public highways, turnpike roads, canals, wharves, ferries, and telegraph lines, and the draining of swamps." Questions of great difficulty may present themselves as to how far the state may impose restraints or limitations upon the exercise of individual rights over private property but no such questions are presented as to public property. Public property is in its very nature subject to social control. The authority of the state over all public works and public undertakings is supreme and this is so whether the public works are undertaken directly by the state or by a municipality or any other agency of the state. Just as the individual may, generally speaking, do what he will with his own, so the state, may exercise a like control over public property. In 95 the same way that private property is subject to individual control, so public property is subject to governmental control.

The provisions of the State and Federal Constitutions guaranteeing liberty and property, refer to individual liberty and private property. They do not confer upon the individual, be he citizen or alien, the right to interfere with the use that the state may make of its public property or any regulation which it may prescribe as to the manner in which its public works shall be built. The constitutional safeguards which surround the liberty of the individual confer upon him no right or liberty to engage in public work. The statute under consideration does not involve governmental interference with individual liberty. The attempt of the contractors engaged in public work to deprive the state of the right to prescribe the conditions upon which the work shall be done, is the assertion of the right of individual interference with the government. The manner in which public works shall be built is a matter wholly within the sphere of social as distinguished from individual control. We cannot lose sight of the fact that there are these separate and distinct spheres of action. It may not be possible to draw with precision the line of demarcation between them, but we all nevertheless recognize that there is a line of demarcation to be drawn. As we deny to the state the right to intrude into the individual sphere of action and to prescribe what we shall believe, and except where the public welfare is involved, what we shall publish, or to supervise private morals, so the state denies to the individual the right to intrude within its social sphere of action and insist that he has a right to be employed upon its public works. The right of state control springs from the public or social character of the work. Owing to the narrow sphere to which the state's activities have, in the past, been limited, the assertion of the state's right of public property seems to have been con-

fined principally to unappropriated lands, waters, wild beasts, fishes and birds, but over those things to which the state's right of property attached the old books recognized the proprietary right of the sovereign power which carried with it the right to discriminate either against subjects or foreigners. (Grotius "Rights of War and Peace," book II, chapter II, § 5.) In recent times the state's proprietary interests have been greatly extended. Over those interests it enjoys the right of a proprietor or owner. The public property of the modern state is not inconsiderable. It owns its highways, harbors, canals, aqueducts, bridges, markets, libraries, art galleries and many other valuable possessions. Over all these things and others of a like nature the state is now proprietor and owner. Its sphere of ownership is being constantly extended. Formerly the functions

96 represented by the public properties enumerated above were left entirely to individual initiative as indeed were also such functions as the army, navy, police and courts of justice now perform. The performance of these services are necessary to the enjoyment of modern social life and the welfare of the citizenship of the state depends upon their proper administration. The uses to which these public properties shall be put are to be determined by the legislature subject only to the Constitution. There are, generally speaking, no provisions of the Constitution that impose limitations upon the exercise of the legislative power over these properties, except such as are inherently attached to the exercise of the police power. Nor is it apparent that this extension of the state's activity has in any way violated the liberty of the citizen. The exercise by the state of these activities may in a negative sense have restricted the liberty of some, but in a positive sense the freedom of all has been increased on account of them. In the building of the state's public work- we have an example through the exercise of the powers of government of the organized co-operation of our citizenship. In its capacity of owner and proprietor, the state is not hampered by restrictions as to the manner in which it shall cause its public works to be constructed. There are many uses to which an owner or proprietor may put his property which do not violate the rights of others. The state in its capacity of proprietor or owner may make such use of its own public property as it deems conducive to the social well-being. In the use that it makes of such property it is not required to refrain from discrimination. The largest measure of benefit may sometimes result from discrimination. Whether or not discriminations made in regard to public property sustain a relation to the public welfare is for the legislature and not the courts to determine. The modern state, through the ownership of its public property, affords opportunities for public co-operation. The motive which actuates it is service, not profit. Its service, to be effective, must be rendered where it is needed and in rendering it it is not obliged, in the use of its public property, to secure immediate equality of benefits to all; it is sufficient if the ultimate result be to promote the general welfare. The public property or commonwealth should of course be used to promote the general welfare, but the restraints or checks to which government is by constitutional provisions subjected, when it acts in

reference to private property, have no application where it acts in relation to public property. Within this sphere and in regard to this public property, government is free to prescribe such regulations as will best promote the general welfare. Where the state has, in a particular sphere, replaced private enterprise, as it has replaced it in the control and building of its public works, it cannot
97 effectively accomplish its purpose if it is to be hampered by the same restraints which are imposed upon it when it exercises its authority over private property. Where it acts in its capacity of proprietor or owner in reference to its own public property, these restraints can only serve to hamper and embarrass the state in the exercise of its rights of ownership. If, in the exercise of the police power, the state may regulate private property to promote the general welfare of its citizens, a fortiori it may, by virtue of that power, exercise control over its own public property.

Public works, like other public property, are within the police power of the state. The character of the work to which the statute under consideration applies being public, the statute itself is an exercise by the sovereign of its police power. The statute being an exercise of the police power of the state it necessarily follows that the provisions of the Fourteenth Amendment of the Federal Constitution and article 1, section 1, of the Constitution of this state, so far as they guarantee the right of individual liberty and property, are without application. As Mr. Justice Field said: "No one has ever pretended, that I am aware of, that the Fourteenth Amendment interferes in any respect with the police power of the state." (*Bartemeyer v. Iowa*, 18 Wall. 129, 138.) In *Olsen v. Smith* (195 U. S. 332) it was held that although state laws concerning pilotage are a regulation of commerce, they fall within that class of powers which may be exercised by the states until Congress has seen fit to act upon the subject. In that case the argument was made that the right of a person who is competent to perform pilotage services to render them, is an inherent right guaranteed by the 14th Amendment and that, therefore, all state regulations providing for the appointing of pilots and restricting the right to pilot to those duly appointed was repugnant to the 14th Amendment. In reply to this contention, Mr. Justice White said: "But this proposition in its essence simply denies that pilotage is subject to governmental control, and therefore is foreclosed by the adjudications to which we have previously referred." (p. 344.) The state has generally speaking, the right to employ upon public work whom it will and to prescribe such conditions as it sees fit to prescribe. It has the right to employ certain citizens to the exclusion of others and the citizens not so employed are not in any legal sense unlawfully discriminated against. As was said by Mr. Justice Harlan in *Atkin v. Kansas* (191 U. S. 207, 222): "It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf
98 of its municipalities. No court has authority to review its

action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern." In replying to the contention that a state regulation as to the manner in which public work should be performed was a violation of the liberty of the employee and employer, Mr. Justice Harlan said: "It is sufficient to answer that no employé is entitled, of absolute right and as a part of his liberty, to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do." (p. 223.) If the legislature can lawfully discriminate between citizens as to whom it will employ upon its public works, it follows that it can also discriminate as between citizens and aliens. The whole matter as to how public works shall be built rests entirely within the police power of the state. The recognition of this principle seems to me to solve many of the difficulties that otherwise attach to this case. It is manifest that aliens as well as citizens are subject to the exercise of the police power. Nor can it be correctly contended that any treaty that exists between the United States and any foreign government excludes the citizens of that government who reside here from the operation of the police power of the state. If the police power includes, as has been said, "the power to govern men and things" (*Munn v. Illinois*, 94 U. S. 113, 125), that power does not become less potent when it is applied exclusively to public property being used for public purposes. So far as those trades or callings which are subject to governmental regulations are concerned, it is settled that the state may refuse to grant to aliens, because of the fact of alienage, a license to engage in them. (*Patson v. Pennsylvania*, 232 U. S. 138; *Commonwealth v. Patson*, 231 Penn. St. 46; *McCready v. Virginia*, 94 U. S. 391; *State v. Travelers Insurance Co.*, 70 Conn. 590; *Matter of O'Neill*, 90 N. Y. 584; *Opinion of Justice*, 122 Mass. 594; *Bloomfield v. State*, 86 Ohio St. 253.) If the state may debar aliens from participating in those private occupations or trades which are subject to governmental regulation, as has been held in the cases cited, there is no room for the argument that it cannot debar aliens from working upon its own public works which are wholly subject to its control. In the assertion by the state of its right to control the manner in which public work shall be constructed, it is immaterial whether the public work is done directly by the state or by a municipality or independent contractor. (*Atkin v. Kansas*, 191 U. S. 207; *Ellis v. U. S.*, 206 U. S. 246; *People ex rel. Cossey v. Grout*, 179 N. Y. 417.) If the work was private

99 and the public welfare in no way involved, it is clear that the legislature could not deny to the individual employer the right to employ aliens. (*Yick Wo vs. Hopkins*, 118 U. S. 356, 369.) If the work was private, and the exclusion of aliens was in fact necessary to the protection of the public welfare, such exclusion would be within the police power. (*Yick Wo v. Hopkins*, *supra*.) Where the work, as in the cases under consideration, is public and, therefore, wholly subject to the police power, the exclusion of aliens need not be shown to sustain any relation to the public welfare in order to be

valid. In such case, the exclusion is merely an incident of that social control to which such public works are, in all respects, subject. The fact that the state may exercise complete control over its public works or other public property does not carry with it the right to use its public property so as to violate the rights of either its citizens or aliens to life, liberty or property. The state, no less than the individual, is obligated to so use its public property, except when it acts to promote the general welfare, as not to impair the rights of others. For this reason it cannot lawfully exclude either citizens or aliens from its public highways or deny to either the right to participate in the benefits of those public utilities which it may own and operate and upon the equal administration of which the welfare and happiness of others depend. The limitations to which the state is subject in the construction and use of its public works are only those to which the police power is subject. These restraints it is not now necessary to consider, as they have no application to the exclusion of aliens from working upon public work. It is sufficient, I think, to point out that discriminations on account of race or religion, that sustain no relation to the general welfare are not within the police power.

In my opinion the judgment of the Appellate Division reversing the judgment of conviction should be reversed and the judgment of conviction affirmed.

COLLIN, J. (dissenting):

This appeal requires us to determine whether or not section 14 of the Labor Law is a constitutional enactment. The section is:

"§ 14. Preference in employment of persons upon public works.—In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the state of New York. In each contract for the construction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void. All boards, officers, agents or employees of cities of the first class of the state, having the power to enter into contracts which provide for the expenditure of public money
100 on public works, shall file in the office of the commissioner of labor the names and addresses of all contractors holding contracts with said cities of the state. Upon the letting of new contracts the names and addresses of such new contractors shall likewise be filed. Upon the demand of the commissioner of labor a contractor shall furnish a list of the names and addresses of all sub-contractors in his employ. Each contractor performing work for any city of the first class shall keep a list of his employees, in which it shall be set forth whether they are naturalized or native born citizens of the United States, together with, in case of naturalization, the date of naturalization and the name of the court where such naturalization was granted. Such lists and records shall be open to the inspection of the commissioner of labor. A violation of this section shall constitute a misdemeanor and shall be punishable by a fine of

not less than fifty dollars nor more than five hundred dollars, or by imprisonment for not less than thirty nor more than ninety days, or by both such fine and imprisonment." (Laws of 1909, ch. 36 [Cons. Laws, ch. 31], § 14.)

The defendant, in constructing sewer basins pursuant to a contract between the city of New York and himself, employed persons who were not citizens of the United States, one of whom came from Italy. The judgment of the Court of Special Sessions of the city convicting him of a misdemeanor therein was reversed by the Appellate Division solely for errors of law.

The question before us, necessitating as it does a decision concerning fundamental civic principles, is of unusual gravity. With the wisdom or unwisdom, the justice or injustice of the enactment, or the practical effects of our decision, we have no concern; those matters are within the legislative power and are not subject to review by us. This court has neither the inclination nor the power to encroach upon the legislative department of the government of the state or assume any part of its functions or responsibilities. The measure of our duty is exhausted in ascertaining the legislative intention expressed in the enactment and determining and declaring with cold neutrality that it either does or it does not ignore and transcend the limits which the people of the state, conscious that free government consists largely in rigid restrictions upon itself imposed and acquiesced in by the governed, have placed by the Constitution upon themselves and their representatives. State and people are inseparable ideas, for the state is the form in which the people have become organized.

The statute, through the intent expressed by it, if valid, prohibits the state and all the counties, towns, cities and villages thereof and all contractors with the state or any of those municipalities from employing all persons not born or naturalized in and subject to
101 the United States (Const. of U. S. art. XIV, § 1)—all aliens—in the construction of public works, that is, fixed works for public use. (*Ellis v. Common Council of Grand Rapids*, 123 Mich. 567; *Ellis v. United States*, 206 U. S. 246.) It, in form, deprives contractors with the state or any municipality of the right to employ aliens and it deprives all aliens of the right of being subjects of employment, of the right to offer their labor for wages, in such construction. Its purpose, avowedly, is to promote the welfare of wage-earning citizens by destroying competition from aliens in the construction of all public work within the state. The briefs and arguments of the counsel are in accord with those conclusions.

The respondent asserts that the enactment is in conflict with and, therefore, void under certain provisions of the State and Federal Constitutions. Of those, we cite the following: "No person shall * * * be deprived of life, liberty or property without due process of law." (Const. of State, art. I, § 6.) "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the

laws." (Const. of the U. S. art. XIV, § 1.) While the immediate inducement to and purpose in the adoption of this article of the United States Constitution was the protection of the liberty and property of colored persons, it is effective as a guaranty, additional to those of the State Constitutions, against encroachment by the legislatures of the states upon the fundamental and constitutional rights of any person. (*Holden v. Hardy*, 169 U. S. 366, 382.) It is established, beyond useful questioning or discussion, that aliens equally with citizens are under and protected by the constitutional guaranties invoked by the defendant here. (*Yick Wo v. Hopkins*, 118 U. S. 356; *State v. Montgomery*, 94 Me. 192; *Commonwealth v. Hanna*, 195 Mass. 262.) Within their operation citizen and alien are legal equals and alienage is not and cannot be a basis or justification of differentiation or discrimination between them.

The legislative power of the people of the state is plenary except as they have abridged it by the State Constitution or consented to its restricted by the Federal Constitution. That power is vested in the legislature. The statute under consideration is valid unless it transcends the constitutional restrictions already quoted; if it overpassed them it was and is as inoperative and impotent, as to persons lawfully assailing it, as if non-existent. Whether it did or did not

102 by the legislature and its efficiency to effect it. The purpose of a statute impugned as unconstitutional must be determined from the natural and legal effect of the language employed, and whether it is or is not repugnant to constitutional provisions must be determined from its natural effect when put into operation. (*Lochner v. New York*, 198 U. S. 45, 64; *Henderson v. Mayor, etc., of N. Y.*, 92 U. S. 259, 268.) The statement already made of the intent and the general purpose to be effected by the statute under consideration need not be repeated.

Constitutional law has always deemed and declared the right to sell or purchase labor a part of the individual liberty and property safeguarded by the constitutional provisions we have quoted. Refraining from referring to the many judicial expressions of the principle, we quote the most recent of those of the United States Supreme Court: "The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money." (*Coppage v. Kansas*, 236 U. S. 1, 14.) We have said: "Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in

all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation; all laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power, which will be noticed later), are infringements upon his fundamental rights of liberty, which are under constitutional protection." (Matter of Jacobs, 98 N. Y. 98, 106.) The principle has been frequently applied. (Bertholf v. O'Reilly, 74 N. Y. 509, 515; People v. Marx, 99 N. Y. 377; People v. Gillson, 109 N. Y. 389; People v. Hawkins, 157 N. Y. 1; People ex rel. Tyroler v. Warden of City Prison, 157 N. Y. 116; People v. Williams, 189 N. Y. 131; Lochner v. New York, 198 U. S. 45; Adair v. U. S., 208 U. S. 161.) Any person who is banned by a statute from employment in the construction of the public works within the state is deprived of liberty and property, any person who is likewise

103 banned from employing any other person in such construction is likewise affected. To constitute the deprivation, the inhibition of the statute need not include employment upon the construction of all works within the state. It need not be universal. The deprivation exists when the right to offer one's labor or services or the right to employ the labor or services of another upon a specified work or at a specified place or time is destroyed. (People v. Williams, 189 N. Y. 131; People v. Hawkins, 157 N. Y. 1; Matter of Tiburcio Parrott, 6 Sawyer [U. S.], 349.) The section 14 effects such deprivation and is unconstitutional and invalid unless there are conditions or legal principles justifying it. The appellants assert that there are.

The appellants assert, and as the chief and predominant support of their position, that the state has the right to declare, in the form of a statutory enactment, whom it and the municipalities will not employ, and contractors with them shall not employ upon public works and in public undertakings, and is in this respect as free and untrammelled as the individual employer. This claim is unrelated to and seeks no basis or justification in the police power of the state. It is oblivious of the existence of the police power. It rests exclusively upon the principle that the state is the owner and proprietor, as the guardian and trustee for the people, of the public works, undertakings and institutions, and as such proprietor has the right to control, manage and conduct them under such conditions, in such mode and with such employees and appointees as it will, exercising without limit, as may the individual employer, its judgment, choice or caprice. The authority directly relied upon to uphold the claim is *Atkin v. Kansas* (191 U. S. 207).

In the *Atkin* case was involved the validity under the Constitution of the United States of the statute known as the eight-hour law of Kansas. The law (speaking generally but with sufficient exactness) constituted eight hours a day's work for persons employed by or on behalf of the state or a municipality, the current rate of per

diem wages in the locality where the work was performed, the minimum wage to be paid and the requirement or allowance of more than eight hours' work per calendar day an offense. It provided, further, that persons employed by contractors with the state or a municipality or their sub-contractors should be deemed employees of the state or the municipality. Atkin, in constructing a pavement in Kansas City, under a contract with it, permitted a person employed by him to work ten hours each calendar day, and by a court of Kansas was adjudged guilty of a violation of the statute. The Supreme Court of Kansas and the Supreme Court of the United States affirmed the judgment. The decision of the United States Supreme Court is expressly limited to the facts of that case. It was grounded in the two principles it enunciated: (a) The construction of the pavement was done by the state through a governmental agency and was of a public character; and (b) being of a public character, the statute, in regulating, as to those undertaking it, the mode in which and the conditions upon which it should be executed did not infringe the personal liberty of Atkins or his employees, and expressed a public policy with which the courts had no concern. The court said: "We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the state and its municipal agents acting by its authority, it is for the state to prescribe the conditions under which it will permit work of that kind to be done. Its action touch-
in such a matter is final so long as it does not, by its regulations, infringe the personal rights of others; and that has not been done." (p. 224.) Chief Justice Fuller and Justices Brewer and Peckham dissented from this decision. (See, also *United States v. Martin*, 94 U. S. 400.)

The Atkin case does not authorize or decide the claim of the appellants. It does not reach the basal element of the section 14. The section destroys absolutely the liberty of aliens to contract to work, their right to tender and sell their labor and services, and the right of the contractors to hire them or buy their labor, in and for constructing any public works. It does not fix the hours of each day through which an alien laborer may work or his compensation; it declares that an alien shall not be permitted to be a laborer and deprives him of the right to exercise the choice and freedom of being willing or unwilling to work upon public works under regulations enacted by the state, and the contractors of the right to employ him. Undoubtedly, no one has an inherent right to work or perform work for the state, which may in the regular and orderly administration and management of its affairs and institutions, in its proprietary capacity, contract as and with whom it chooses, except as restricted by the Constitution, to which it is not superior in any capacity. In the erection of a new capitol, for instance, it could select its architects, its decorators, its contractors and its superintendent and thereby reject the applications of those who were not selected. This, however, differs substantially and inherently from a statutory enactment that in the construction of any public building by or for the state or a municipality only persons residing in the

city of Albany shall be engaged or employed. In the absence of the statute every person would be free to offer his labor and ability as he willed, and accept the terms, regulations and conditions fixed by the employer, whether state, municipality or contractor; with the statute every person residing elsewhere than in Albany would be deprived of that freedom, and to that extent of his liberty
105 and property. The reasonable range and effect of a principle under discussion aids in determining its validity. The state is the proprietor of its educational, penal and charitable institutions equally with its public works. The claim of the appellants, if sustained, would establish that it may declare by statutes (apart from the constitutional civil service provisions) that in the administration of those institutions, and of its public works and affairs, only the registered electors of a designated party, or only unmarried persons, or only with persons, or Protestants or Catholics, or persons born in this state, shall be employed or appointed, or that certain designated citizens shall not be employed, or that goods or products made or grown by corporations of this state should not be purchased. The illustrations might be multiplied. The state may not, by virtue of its proprietorship, destroy by a statute the right of any person to tender for sale and sell his labor or services, upon such terms as he deems proper, in the construction of public works, or in the administration of public institutions, or the right of a person contracting to construct public works, to buy the labor or employ the person. The claim of the appellants that the state may with arbitrariness, as an untrammelled proprietor, forbid by statute the employment in the construction of public works of designated persons, or a designated class of persons, is ill-founded, and does not justify the infringement, worked by the section 14, of the personal rights of liberty and property guaranteed to the defendant and the alien class by the State and Federal Constitutions.

The appellants assert further that the section 14 is supportable as a reasonable exercise of the police power of the state—a power inherent in the state, which the state did not surrender when becoming a member of the United States under the Federal Constitution, and which is exercisable for the preservation or promotion of the public health, safety, morals and general welfare or the prevention of fraud or immorality. While the protection of the liberty and property of the individual is a main purpose of a government and the Constitution, no person or property is immune from the power of the legislature to impose restraints and burdens upon either as required by the public safety or welfare. The cases are numerous and familiar in which the courts have held that the legislature of the states may, by virtue of the police power, limit the enjoyment or control of property and the right of making contracts. Whenever, however, it is sought to justify or support a statute by invoking the police power, it must appear that it reasonably and fairly tends, in a perceptible and clear degree, towards one or more of the objects of that power; and while it is within the general scope of legislative power to determine whether or not there is, in a given condition, necessity for its

exercise, it is within the judicial power and duty to determine whether or not the legislative determination bears any reasonable relation to the public health, safety or morals. Unless such relation exists, the determination must be deemed by the courts arbitrary and unjustified by the police power. (Health Department of N. Y. v. Rector, etc., 145 N. Y. 32; Fisher Co. v. Woods, 187 N. Y. 90; Lochner v. New York, 198 U. S. 45; Chicago, B. & Quincy R. R. Co. v. McGuire, 219 U. S. 549; Parks v. State, 159 Ind. 211; Holden v. Hardy, 169 U. S. 366; Dobbins v. Los Angeles, 195 U. S. 223; McLean v. Arkansas, 211 U. S. 539; Coppage v. Kansas, 236 U. S. 1.) It is argued that the section is within the police power because its natural effect, by interdicting competition from the alien class, increases to citizens the likelihood of employment and increased wages. The argument is both ill-founded and pernicious. The constitutional provisions in question were wisely intended and do safeguard the liberty and the property of the aliens lawfully residing in the United States. Under and to the extent of these provisions, they are on an equal footing with citizens. It would be unreasonable heedlessness to assert that the public welfare would be promoted by assuring and compelling unemployment to a class or to classes or to parts of classes of workers in order that those not banished from the right of being employed might have fuller employment and larger compensation. It is argued, too, that there is a danger or a danger to be apprehended in allowing aliens to work upon the public works, because they, through loyalty to the governments to which they owe allegiance, may destroy or diminish the efficiency or safety of those works. The argument is insubstantial, and common knowledge and experience refute it. Persons of unbalanced, evil or uncivilized minds do not form a definable societal class. Each class is infested with them and the law must deal with them as their acts make necessary. In the construction of by far the greater part of the public works opportunities for the commission of the apprehended acts would not exist, and in the alien, as in the other classes of the state, the number of those who would commit them is an undiscoverable and insignificant minority. Obviously, there are civil positions and offices, and public works of a military, naval or analogous nature, or periods of war in regard to which aliens may, under the police power, be banned or restrained. Section 14 has not a relation in substance or intent to any of those positions or conditions, and the state or a municipality may, in the absence of the statute, deny at any time, and, at least, when conditions justify recourse to the police power, may by contract bind those contracting with them to deny employment to members of a dangerous group or class. I do not perceive in the arguments of counsel, or conceive apart from them, any possible relation of the section to the police power.

107 The further claim of the appellants that the defendant, by undertaking the work, waived the guaranty of the Constitution is not tenable. The transaction between the city and the defendant was a matter of contract. The city through specifications and proposals requested bids for their fulfillment and accepted that

made by the defendant. If the statute was valid, it incumbered, through legislative power and not through a meeting of the minds of the parties, the contract made; if invalid, it was, as to the defendant, a nullity.

The respondent urges that the section is repugnant to the Federal Constitution as denying to aliens the equal protection of the laws. The primary question in discussing this assertion is, what is the purpose of the statute. The answer manifestly is, as we have already stated, the promotion of the welfare and prosperity of certain wage-earners by forbidding the employment in the construction of public works of other wage-earners.

The second question is, is the purpose constitutionally lawful. We hold it is not, for the reasons stated, and being thus invalid, no arbitrary classification or discrimination between the laborers of the state effecting the unequal protection of the laws can make it more invalid. If it were valid because the state has the power, arbitrarily and in accord with its unfettered and un-biased will, to prohibit the employment of a class in the construction of its public works, by the same token, it has the power, with like paramountcy, to designate the prohibited class, which could not with reason allege a lack of equal protection of the laws. If it were declared valid because within the police power, it could not be declared invalid on the ground that the equal protection of the law to those whom the exercise of that power had lawfully classified and barred had been invaded. Where the purpose of a statute is lawful, the question might arise whether a classification of persons or things, adopted as a part of the prescribed means for effecting it is legal and justifiable. (*Billings v. Illinois*, 188 U. S. 97, 102; *Patsone v. Pennsylvania*, 232 U. S. 138.)

A review of the relevant decisions will disclose that the courts frequently assume that the "due process of law" clause is the equivalent of "the equal protection of the laws" clause. In *Holden v. Hardy* (169 U. S. 366, 382) the court said: "As the three questions of abridging their immunities, depriving them of their property, and denying them the protection of the laws, are so connected that the authorities upon each are, to a greater or less extent, pertinent to the others, they may properly be considered together." Professor Willoughby writes: "It would seem, however, that the broad interpretation which the prohibition as to 'due process of law' has received is sufficient to cover very many of the acts which, if committed by the states, might be attacked as denying equal protection. Thus

108 it has been repeatedly declared that enactments of a legislature directed against particular individuals or corporations, or classes of such, without any reasonable ground for selecting them out of the general mass of individuals or corporations, amounts to a denial of due process of law so far as their life, liberty or property is affected." (2 Willoughby on the Constitution, page 874.) Recent decisions verify this statement. (*Coppage v. Kansas*, *supra*; *Adair v. United States*, 208 U. S. 161; *Lochner v. New York*, 198 U. S. 45; *Riley v. Massachusetts*, 232 U. S. 671; *People v. Marcus*, 185 N. Y. 257; *Fisher Co. v. Woods*, 187 N. Y. 90; *People v. Williams*, 189

N. Y. 131; *City of Chicago v. Hulbert*, 205 Ill. 346.) If the "equal protection of the laws" clause be applied, however, it must be held that the attempted classification of the aliens as a prohibited class is unreasonable and arbitrary for the reasons which excluded it from the police power, and for such reasons is unconstitutional and void. (*People v. Orange County Road Const. Co.*, 175 N. Y. 84; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *Southern Ry. Co. v. Greene*, 216 U. S. 400; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61; *State v. Hammer*, 42 N. J. L. 435, 440.)

In view of what has been written, it is not necessary to determine whether or not the section is repugnant to the existing treaty between the United States and Italy.

My conclusion is that the section 14 unconstitutionally attempted to deprive the defendant as the contractor and employer of labor, and the alien class as the vendors of their labor, of liberty and property, and is void.

The judgment should be affirmed.

Willard Bartlett, Ch. J., Chase, Hogan, Miller and Seabury, JJ., concur with Cardozo, J. (Willard Bartlett, Ch. J., and Seabury, J., in separate opinions); Collin, J., reads a dissenting opinion for affirmance.

Judgment of Appellate Division reversed and judgment of conviction affirmed.

[Endorsed:] *People v. Crane.* Cardozo, J.

109 STATE OF NEW YORK,

County of New York,

Clerk's Office of the Court of Special

Sessions of the City of New York, ss:

I, John P. Hilly, Clerk of the Court of Special Sessions of the City of New York, do hereby certify that I have compared the annexed copy of order and judgment of the Court of Special Sessions of the First District of the City of New York, on the remittitur of the Court of Appeals making the judgment of the Court of Appeals the judgment of said court, and ordering and adjudging that the judgment of said Court of Special Sessions of the First District of the City of New York reversed by the Appellate Division of the Supreme Court for the First Judicial Department and affirmed by the Court of Appeals be enforced and carried into execution and effect on file in this office, and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof, I have hereunto set my hand, and affixed the seal of said court, in the Borough of Manhattan, City and County of New York, this 6th day of March, 1915.

[Seal Court of Special Sessions of the City of New York.]

[SEAL.]

JOHN P. HILLY,

*Clerk of the Court of Special Sessions
of the City of New York.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 3/6/15. E. F. N.]

110 At a Term of the Court of Special Sessions of the City of New York Held at the Criminal Courts Building, in the Borough of Manhattan, City of New York, on the 5 Day of March, 1915.

Present: Hon. Frederic Kernochan, Justice.

THE PEOPLE OF THE STATE OF NEW YORK
against
CLARENCE A. CRANE, Defendant.

Order on Remittitur.

Whereas, heretofore, to wit; at a term of the Court of Special Sessions of the City of New York held at the Criminal Court Building in the Borough of Manhattan, City of New York, on the 9 day of December, 1914, the above named defendant was in due form of law convicted by the said Court of a misdemeanor, to wit, unlawfully employing persons not citizens of the United States in the construction of a public work of a municipality by a person contracting with the municipality for the construction thereof, in violation of Section 14 of the Labor Law of the State of New York, and it was thereupon ordered and adjudged that the defendant Clarence A. Crane, for the misdemeanor aforesaid, pay a fine of Fifty Dollars, or, in default thereof, stand committed to the City Prison of the City of New York for a period not exceeding ten days;

And whereas, the said Clarence A. Crane thereafter duly appealed from the said judgment to the Appellate Division of the Supreme Court of the State of New York in the First Judicial Department.

111 And whereas, at a Term of the Appellate Division of the said Supreme Court, held in and for the first judicial Department, to wit, at the Court House thereof in the County of New York on the 31st day of December, 1914, the said judgment of this court was by the judgment of the said Appellate Division unanimously reversed and the defendant discharged.

And whereas, the People of the State of New York thereafter duly appealed from the said judgment of the said Appellate Division to the Court of Appeals of the State of New York,

And whereas, at a Term of the said Court of Appeals of the State of New York held at the Capitol in the City of Albany, on the 25th day of February, 1915, the said judgment of the said Appellate Division was by the judgment of the said Court of Appeals reversed and the aforesaid judgment of conviction rendered against the above named Clarence A. Crane was by the said Court of Appeals affirmed and the record herein, and the proceeding in the said last mentioned Court upon the said appeal, were by the said judgment remitted to this Court to be proceeded upon according to law, as by the remittitur of the said Court of Appeals now on file in this Court, more fully appears.

Now, therefore, on reading and filing the said remittitur, and on

motion of Charles Albert Perkins, Esquire, District Attorney of the County of New York, it is

Ordered that the said judgment of the said Court of Appeals be and the same hereby is made the judgment of this Court, and it is further

Ordered that the said judgment of this Court so appealed from as aforesaid and so affirmed by the Court of Appeals of the
112 State of New York, be and the same is hereby directed to be enforced and carried into execution and effect.

Enter.

F. KERNOCHAN.

113 STATE OF NEW YORK,
County of New York,
Clerk's Office of the Court of Special
Sessions of the City of New York, ss:

I, John P. Hilly, Clerk of the Court of Special Sessions of the City of New York do hereby certify that I have compared the annexed copies of petition for writ of error, assignment of error and undertaking on appeal and endorsements thereon, on file in this office, and that the same are correct transcripts thereof and of the whole of said originals.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, in the Borough of Manhattan, City and County of New York, this 6th day of March, 1915.

[Seal Court of Special Sessions of the City of New York.]

[SEAL.]

JOHN P. HILLY,
Clerk of the Court of Special Sessions
of the City of New York.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 3/6/15. E. F. N.]

114 Court of Special Sessions of the First District of the City of New York.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,
against
CLARENCE A. CRANE, Defendant.

To the Supreme Court of the United States:

The petition of Clarence A. Crane, who resides in the City, County and State of New York, and who is the defendant in the above entitled cause, respectfully shows:—

I. On or about November 23, 1914, petitioner was duly awarded a contract to construct a catch (or sewer) basin in the Borough of Manhattan, City, County and State of New York for the City of New York, and the agreed price therefor being less than \$1,000, the contract therefor consisted of the bid and award.

II. At that time Chapter 36 of the Laws of 1909 of the State of New York, and known as the Labor Law, contained a section, styled Section 14, as follows:

"SEC. 14. Preference in Employment of Persons upon Public Works.—In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the state of New York. In each contract for the construction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void. All boards,

115 officers, agents or employees of cities of the first class of the state, having the power to enter into contracts which provide for the expenditure of public money on public works, shall file in the office of the commissioner of labor the names and addresses of all contractors holding contracts with said cities of the state. Upon the letting of new contracts the names and addresses of such new contractors shall likewise be filed. Upon the demand of the commissioner of labor a contractor shall furnish a list of the names and addresses of all subcontractors in his employ. Each contractor performing work for any city of the first class shall keep a list of his employees, in which it shall be set forth whether they are naturalized or native born citizens of the United States, together with, in case of naturalization, the date of naturalization and the name of the court where such naturalization was granted. Such lists and records shall be open to the inspection of the commissioner of labor. A violation of this section shall constitute a misdemeanor and shall be punishable by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment for not less than thirty nor more than ninety days, or by both such fine and imprisonment."

III. Your petitioner duly began the performance of his said contract, and, believing that said section 14 of the Labor Law was and is unconstitutional and void, being in contravention of the Constitution of the State of New York, and of the Constitution of the United States, and of various treaties of the United States with various other sovereign states including Italy, as will be hereinafter more fully set forth, he employed, among others, to perform work on said contract laborers who were not citizens of the United States or of the State of New York, but who were subjects of foreign nations, and who belonged to that class commonly known as aliens. One of said laborers was a subject of the King of Italy, as is shown by the record.

IV. An information as prescribed by law was laid before a City Magistrate, having jurisdiction thereof complaining of said acts of
116 your petitioner, a warrant thereon was issued and your petitioner was apprehended and brought before said magistrate and pleaded "not guilty" and was held for trial at — Special Sessions of the First District of the City of New York, a court duly constituted and having jurisdiction of the crime of which your peti-

tioner was charged. Upon December 9, 1914, your petitioner was tried in said court before Hon. James J. McInerney, Presiding Justice, and Hon. Howard J. Forker, and Lorenz Zeller, associate justices, and the facts hereinbefore set forth having been proven, and the prosecution having rested, your petitioner moved to dismiss on the ground that said law was unconstitutional and void being in violation of various treaties (then cited) of the United States and of the Constitutions of the United States and of the State of New York, and said motion having been denied and defendant having rested, the Court found him guilty and sentenced him to pay a fine of Fifty Dollars or in default thereof to be committed to the City Prison for the term of ten days.

V. Whereupon, your petitioner, said defendant duly appealed from said sentence and the judgment thereon to the Appellate Division of the Supreme Court for the First Judicial Department, having jurisdiction thereof. Said appeal came on to be heard on the 17th day of December, 1914, and said Court duly heard argument, at which time your petitioner duly urged reversal of said judgment and the dismissal of said action upon all the grounds urged below, and the said court, having duly deliberated thereon, rendered an opinion in which it declared and adjudged that said law was unconstitutional and void being in violation of the fourteenth amendment of the Constitution of the United States, and that the conviction of your petitioner for the alleged violation of the provisions of said law
117 was improper, and directed, ordered and adjudged that said conviction be reversed. A remittitur of said Appellate Division was duly filed in the said Court of Special Sessions on the 11th day of January, 1915, directing the reversal of said conviction and judgment.

VI. By leave of said Appellate Division as by law provided, and upon its certificate that its said decision and order of reversal was based upon questions of law only, the People of the State of New York appealed from said decision and judgment to the Court of Appeals of the State of New York, having jurisdiction thereof. Said appeal came on to be heard on the 25th day of January, 1915, and said court duly heard argument at which time your petitioner duly urged that the decision and judgment of said Appellate Division should be sustained upon all the grounds urged at the trial and before said Appellate Division, and said Court of Appeals, having deliberated thereon, six of the seven judges thereof concurred in three separate opinions in declaring and adjudging that said law was constitutional and was not a violation of any Article of or amendment to the Constitution of the United States or of any treaty entered into or law enacted pursuant to said Constitution, and that the conviction of your petitioner should be sustained and that judgment of the said Appellate Division should be reversed. One of said judges rendered a separate and dissenting opinion declaring that said law was unconstitutional, being a violation of the Fourteenth Amendment of the Constitution of the United States, and that the conviction of your petitioner was illegal and that the judgment of the said Appellate Division reversing said conviction should be

118 affirmed. A remittitur of said Court of Appeals reversing the judgment of the Appellate Division and reinstating said conviction was filed and entered in the said Court of Special Sessions on the 2nd day of March, 1915, and judgment was entered thereon in the said Court of Special Sessions on the — day of March, 1915, making the judgment of the Court of Appeals the judgment of the said Court of Special Sessions. The record and proceedings before the Court of Appeals were remitted to the said Court of Special Sessions in which court they now remain.

VII. The said Court of Appeals of the State of New York is the court of last resort in said State, and the judgment entered upon its remittitur is the final judgment which can be entered in said action in the State of New York, and finally determines said action unless a writ of error to the Supreme Court of the United States shall be allowed.

Your petitioner argued upon said trial and in the Appellate Division that said action should be dismissed, and in the Court of Appeals that the judgment of the Appellate Division reversing his conviction and dismissing said action should be sustained, upon the ground that said law violated Article I, Section 9, subdivision 3, of the United States Constitution in that it was an ex post facto law and applied to contracts in existence at the time of its enactment; Article IV, Section 2, and the Fifth and Fourteenth Amendments of, the United States Constitution, in that it deprived him of liberty and property without due process of law, and made acts penal which are otherwise innocent and harmless and declared a breach of contract to be a crime, and abridged his privileges and immunities as a citizen of the United States, and denied to him the equal protection of the law; Article VI, subdivision 2 of the United States Constitution and treaties of the United States with the governments
119 of Italy, Argentine Republic, Austria Hungary, Belgium, Bolivia, Borneo, Chili, China, Colombia, Costa Rica, Denmark, Ecuador, Japan, Liberia, Paraguay, Persia, Peru, Salvador, Servia, Switzerland and Venezuela, in that it prohibited subjects of said nations from exercising in the State of New York the rights conferred upon them by said treaties, and prohibited your petitioner in the performance of his said contract under penalty of forfeiture of his property and liberty, from according said rights to said aliens.

The decisions of said courts and judges drew in question the validity of a statute of, or an authority exercised, under the State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity and thereby denied to your petitioner, a title, right, privilege and immunity claimed by your petitioner under the Constitution, treaties and statutes of the United States.

Wherefore, your petitioner prays that a writ of error may issue and that he may be allowed to bring up for review before the Supreme Court of the United States the said judgment of conviction of the Court of Special Sessions of the First District of the City of New York, and the remittitur and judgment of the Court of Appeals of the State of New York sustaining said judgment of conviction and

the judgment entered thereon, and also that an order may be made fixing the amount of security which defendant should give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings of this court be suspended and
 120 stayed until the determination of said writ of error by the Supreme Court of the United States, and that your petitioner may have such other and further relief in the premises as may be just.

And your petitioner will ever pray.

CLARENCE A. CRANE,
 By EDWARD M. GROUT, *Attorney.*

EDWARD M. GROUT,
Petitioner's Attorney, 115 Broadway,
Manhattan, New York.

STATE OF NEW YORK,
County of New York, ss:

Edward M. Grout, being duly sworn, deposes and says: That he is the attorney for the petitioner herein, that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

EDWARD M. GROUT.

Sworn to before me this 3rd day of March, 1915.

[SEAL.]

JAY D. NEUSTADT,
Notary Public, Kings County.

Certificate filed in New York County.

Read on application for writ of error, March —, 1915.

Asso. Jus. Supreme Court United States.

121 [Endorsed:] County Clerk's No. —. Court of Special Sessions of the First District of the City of New York. The People of the State of New York, Plaintiffs, against Clarence A. Crane, Defendant. Copy. Petition. Edward M. Grout, Attorneys for Petitioner, 111 Broadway, Manhattan, New York City. Let writ issue, March 4, 1915. Charles E. Hughes, Associate Justice of Supreme Court of the United States.

122 In the Supreme Court of the United States.

CLARENCE A. CRANE, Plaintiff in Error,
 against
 THE PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

And now comes Clarence A. Crane, plaintiff in error, and makes and files this, his assignment of error, and says that on the record

and proceedings in the above-entitled matter, there is manifest error in this, to wit:

I. The Court of Special Sessions of the First Division of The City of New York erred in refusing to dismiss the action against him because Section 14 of Chapter 36 of the laws of 1909 of the State of New York was void and unconstitutional in violation of Article I, Section 9 subdivision 3 of the United States Constitution in that it was an ex post facto law, and applied to contracts in existence at the time of its enactment.

II. The Court of Special Sessions of the First District of The City of New York erred in refusing to dismiss the action against him because Section 14 of Chapter 36 of the laws of 1909 of the State of New York was void and unconstitutional in violation of Article IV, Section 2, and the Fifth and Fourteenth Amendments of, the United States Constitution in that it deprived him of liberty and property without due process of law, and made acts penal
123 which are otherwise innocent and harmless and declared a breach of contract to be a crime, and abridged his privileges and immunities as a citizen of the United States and denied to him the equal protection of the law.

III. The Court of Special Sessions of the First Division of The City of New York erred in refusing to dismiss the action against him because Section 14 of Chapter 36 of the laws of 1909 of the State of New York was void and unconstitutional in violation of Article VI, subdivision 2, of the United States Constitution and treaties of the United States with the governments of Spain, Argentine Republic, Austria Hungary, Belgium, Bolivia, Borneo, Chili, China, Colombia, Costa Rica, Denmark, Ecu-dor, Japan, Liberia, Paraguay, Persia, Peru, Salvador, Servia, Switzerland and Venezuela, in that it prohibited subjects of said nations from exercising the rights and liberties conferred upon them in the State of New York by said treaties and prohibited plaintiff in error in the performance of said contract, under penalty of forfeiture of his property and liberty, from according said rights to said aliens, he being willing to do so, thereby depriving him of liberty and property without due process of law, and made acts penal which are otherwise innocent and harmless, and which were enjoined upon him by said treaties, and denied to him the equal protection of the law.

IV. The Court of Special Sessions of the First Division of The City of New York erred in holding that Section 14 of Chapter 36 of the laws of 1909 of the State of New York does not violate Article I, Section 9, subdivision 3, of the United States Constitution in that it was an ex post facto law, and applied to contracts in existence at the time of its enactment.

V. The Court of Special Sessions of the First Division of
124 The City of New York erred in holding that Section 14 of Chapter 36 of the laws of 1909 of the State of New York does not violate Article IV, Section 2, and the Fifth and Fourteenth Amendments of, the United States Constitution in that it deprived him of liberty and property without due process of law, and made acts penal which are otherwise innocent and harmless and declared

a breach of contract to be a crime, and abridged his privileges and immunities as a citizen of the United States and denied to him the equal protection of the law.

VI. The Court of Special Sessions of the First Division of The City of New York erred in holding that Section 14 of Chapter 36 of the laws of 1909 of the State of New York does not violate Article VI, subdivision 2, of the United States Constitution and treaties of the United States with the governments of Spain, Argentine Republic, Austria Hungary, Belgium, Bolivia, Borneo, Chili, China, Colombia, Costa Rica, Denmark, Ecu-dor, Japan, Liberia, Paraguay, Persia, Peru, Salvador, Servia, Switzerland and Venezuela, in that it prohibited subjects of said nations from exercising the rights and liberties conferred upon them in the State of New York by said treaties, and prohibited plaintiff in error in the performance of said contract, under penalty of forfeiture of his property and liberty, from according said rights to said aliens, he being willing to do so thereby depriving him of liberty and property without due process of law, and made acts penal which are otherwise innocent and harmless and which were enjoined upon him by said treaties, and denied to him the equal protection of the law.

VII. The Court of Special Sessions of the First Division of The City of New York erred in convicting plaintiff in error for a violation of Section 14 of Chapter 36 of the laws of 1909 of the State of New York, which law was unconstitutional and void because it was a violation of Article I, Section 9, subdivision 3, of the United States Constitution in that it was an *ex post facto* law, and applied to contracts in existence at the time of its enactment.

VIII. The Court of Special Sessions of the First Division of The City of New York erred in convicting plaintiff in error for a violation of Section 14 of Chapter 36 of the laws of 1909 of the State of New York, which law was unconstitutional and void because it was a violation of Article IV, Section 2, and the Fifth and Fourteenth Amendments of, the United States Constitution in that it deprived him of liberty and property without due process of law, and made acts penal which are otherwise innocent and harmless and declared a breach of contract to be a crime, and abridged his privileges and immunities as a citizen of the United States and denied to him the equal protection of the law.

IX. The Court of Special Sessions of the First Division of The City of New York erred in convicting plaintiff in error for a violation of Section 14 of Chapter 36 of the laws of 1909 of the State of New York, which law was unconstitutional and void because it was a violation of Article VI, subdivision 2, of the United States Constitution and treaties of the United States with the governments of Spain, Argentine Republic, Austria Hungary, Belgium, Bolivia, Borneo, Chili, China, Colombia, Costa Rica, Denmark, Ecuador, Japan, Liberia, Paraguay, Persia, Peru, Salvador, Servia, Switzerland and Venezuela, in that it prohibited subjects of said nations from exercising the rights and liberties conferred upon them in the State of New York by said treaties, and prohibited plaintiff

126 in error in the performance of said contract, under penalty of forfeiture of his property and liberty, from according said rights to said aliens, he being willing to do so thereby depriving him of liberty and property without due process of law, and made acts penal which are otherwise innocent and harmless, and which were enjoined upon him by said treaties, and denied to him the equal protection of the law.

X. The Court of Appeals erred in reversing the judgment of the Appellate Division for the First Judicial Department of the Supreme Court reversing the conviction of plaintiff in error and dismissing the action against him, because Section 14 of Chapter 36 of the laws of 1909 of the State of New York was void and unconstitutional in violation of Article I, Section 9, subdivision 3, of the United States Constitution in that it was an *ex post facto* law, and applied to contracts in existence at the time of its enactment.

XI. The Court of Appeals erred in reversing the judgment of the Appellate Division for the First Judicial Department of the Supreme Court, which reversed the conviction of plaintiff in error and dismissed the action against him, and in sustaining the original judgment of conviction, of the said Court of Special Sessions of The City of New York, because Section 14 of Chapter 36 of the laws of 1909 of the State of New York was void and unconstitutional in violation of Article IV, Section 2, and the Fifth and Fourteenth Amendments of, the United States Constitution in that it deprived him of liberty and property without due process of law, and made acts penal which are otherwise innocent and harmless and declared a breach of contract to be a crime, and abridged his privileges and immunities as a citizen of the United States and denied to him the equal protection of the law.

127 XII. The Court of Appeals erred in reversing the Judgment of the Appellate Division for the First Judicial Department of the Supreme Court, which reversed the conviction of plaintiff in error and dismissed the action against him, and in sustaining the original judgment of conviction of the said Court of Special Sessions of the City of New York, because Section 14 of Chapter 36 of the laws of 1909 of the State of New York was void and unconstitutional in violation of Article VI, subdivision 2, of the United States with the governments of Spain, Argentine Republic, Austria Hungary, Belgium, Bolivia, Borneo, Chile, China, Colombia, Costa Rica, Denmark, Ecuador, Japan, Liberia, Paraguay, Persia, Peru, Salvador, Servia, Switzerland and Venezuela, in that it prohibited subjects of said nations from exercising the rights and liberties conferred upon them in the State of New York by said treaties and prohibited plaintiff in error in the performance of said contract, under penalty of forfeiture of his property and liberty, from according said rights to said aliens, he being willing to do so thereby depriving him of liberty and property without due process of law, and made acts penal which are otherwise innocent and harmless, and which were enjoined upon him by said treaties, and denied to him the equal protection of the law.

XIII. The Court of Appeals erred in holding that Section 14 of

Chapter 36 of the laws of 1909 of the State of New York does not violate Article I, Section 9, subdivision 3, of the United States Constitution in that it was an ex post facto law, and applied to contracts in existence at the time of its enactment.

XIV. The Court of Appeals erred in holding that Section 14 of Chapter 36 of the laws of 1909 of the State of New York does not violate Article IV, Section 2, and the Fifth and Fourteenth Amendments of the United States Constitution in that it deprived him of liberty and property without due process of law, and made acts penal which are otherwise innocent and harmless and declared a breach of contract to be a crime, and abridged his privileges and immunities as a citizen of the United States and denied to him the equal protection of the law.

XV. The Court of Appeals erred in holding that Section 14 of Chapter 36 of the laws of 1909 of the State of New York does not violate Article VI, subdivision 2, of the United States Constitution and treaties of the United States with the governments of Spain, Argentine Republic, Austria Hungary, Belgium, Bolivia, Borneo, Chili, China, Colombia, Costa Rico, Denmark, Ecuador, Japan, Liberia, Paraguay, Persia, Peru, Salvador, Servia, Switzerland and Venezuela, in that it prohibited subjects of said nations from exercising the rights and liberties conferred upon them in the State of New York by said treaties, and prohibited plaintiff in error in the performance of said contract, under penalty of forfeiture of his property and liberty, from according said rights to said aliens, he being willing to do so, thereby depriving him of liberty and property without due process of law, and made acts penal which are otherwise innocent and harmless, and which were enjoined upon him by said treaties, and denied to him the equal protection of the law.

XVI. The Court of Appeals erred in holding that the State of New York and municipalities of said State may act in a private capacity contrary to the provisions of Article VI, subdivision 2 of the United States Constitution and treaties of the United States with the governments of Spain, Argentine Republic, Austria Hungary,

Belgium, Bolivia, Borneo, Chile, China, Colombia, Costa Rica,
129 Denmark, Ecuador, Japan, Liberia, Paraguay, Persia, Peru,
Salvador, Servia, Switzerland and Venezuela, and in such capacity prohibit subjects of said nations from exercising the rights and liberties in the State of New York conferred upon them by said treaties and by said Article, and the laws of the United States enacted pursuant thereto.

XVII. The Court of Appeals erred in holding that the State of New York and municipalities of said State may act in a sovereign capacity contrary to the provisions of Article VI, subdivision 2 of the United States Constitution and treaties of the United States with the governments of Spain, Argentine Republic, Austria Hungary, Belgium, Bolivia, Borneo, Chili, China, Colombia, Costa Rica, Denmark, Ecuador, Japan, Liberia, Paraguay, Persia, Peru, Salvador, Servia, Switzerland and Venezuela, and in such capacity prohibit subjects of said nations from exercising the rights and liberties in the State of New York conferred upon them by said treaties

and by said article, and the laws of the United States enacted pursuant thereto.

XVIII. The Court of Appeals erred in holding that the State of New York may enforce by its laws in criminal processes, enacted and exercised in its sovereign capacity, acts which said Court of Appeals declared were the exercise of its rights in a private capacity.

XIX. The Court of Appeals erred in holding that the prohibition by Section 14 of Chapter 36 of the laws of 1909, of the employment of aliens upon public works is an exercise of the charitable powers of the sovereign State of New York and is a prevention or alleviation of poverty of its citizens or tends to conserve their property or estates.

130 XX. The Court of Appeals erred in holding that the matters and things prohibited by Section 14 of Chapter 36 of the laws of 1909 are within the police power of the State of New York.

XXI. The Court of Appeals erred in holding that Section 14 of Chapter 36 of the laws of 1909 is a reasonable and proper exercise of the police power of the State of New York.

XXII. The Court of Appeals erred in holding that the moneys expended by The City of New York is the money of the State of New York.

XXIII. The Court of Appeals erred in holding that Section 14 of Chapter 36 of the laws of 1909 did not invade the rights of contractors with The City of New York as well as The City of New York, and of aliens residing in the State of New York.

And the defendant in the above-entitled cause (plaintiff in error in this court) prays that the final judgment of conviction for violation of said law, rendered by the Court of Special Sessions of the First District of The City of New York, and by the Court of Appeals of the State of New York may be reversed, annulled and altogether held for nothing; that the plaintiff in error may be adjudged to be innocent of the crime charged in the information tried in said Court of Special Sessions, and that this Honorable Court will send its mandate to the said Court of Special Sessions of the First District of The City of New York commanding said court to enter judgment in said cause vacating and annulling the judgment of conviction found against him, and commanding said Court of Special Sessions of the First District of The City of New York to release and discharge him, and awarding costs to plaintiff in error, in accordance with the laws and customs of the United States thereunto pertaining.

In order that the foregoing assignment of errors may be
131 and appear of record, the plaintiff in error presents the same to the court, and prays that such disposition be made thereof as in accordance with law and the statutes of the United States in such cases made and provided.

EDWARD M. GROUT,
Attorney for Plaintiff in Error,
115 Broadway, Manhattan, New York City.

Read in application for writ of error.

Asso. Jus. Sup. Ct. United States.

132 [Endorsed:] County Clerk's No. —. Supreme Court of the United States. Clarence A. Crane, Pl'ff in Error, against The People of the State of New York, Def't in Error. (Copy.) Assignment of Error. Edward M. Grout, Attorney for Pl'ff in Error, 111 Broadway, Manhattan, New York City.

133 Court of Appeals, State of New York.

CLARENCE A. CRANE, Plaintiff in Error,
against

THE PEOPLE OF STATE OF NEW YORK, Defendant in Error.

Know all men by these presents, That the National Surety Company, a corporation organized and existing under the laws of the State of New York, having an office and principal place of business at No. 115 Broadway, Borough of Manhattan, City of New York, is held and firmly bound unto the above named The People of the State of New York, in the sum of Five Hundred (\$500.00) Dollars, to be paid to the said The People of the State of New York, to which payment well and truly to be made the said National Surety Company bind- itself, its successors and assigns, firmly by these presents.

Signed and sealed with its corporate seal this 3d day of March, 1915.

Whereas, the above named Clarence A. Crane, has prosecuted an appeal by Writ of Error to the United States Supreme Court to reverse a certain judgment rendered in the above entitled action by the Court of Appeals of the State of New York.

Now, Therefore, the condition of the above obligation is such, that if the said Clarence A. Crane shall prosecute his Writ of Error to effect, and answer all damages and costs if he fails to make his plea good, then this obligation to be void; else to remain in full force and virtue.

[SEAL.]

NATIONAL SURETY COMPANY,
By L. M. C. ADAMS,
Resident Vice-President.

Attest:

E. M. MCCARTHY,
Res. Ass't Secretary.

134 STATE OF NEW YORK,
County of New York, ss:

On this 3rd day of March, 1915, before me personally appeared L. M. C. Adams, Resident Vice-President of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of New York; that he is the Resident Vice-President of the National Surety Com-

pany, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Resident Vice-President of said Company by like authority, and that the liabilities of said Company do not exceed its assets as determined by an audit of the Company's annual statement filed with the Superintendent of Insurance of the State of New York and certified to by said Superintendent, pursuant to section 2 of chapter 182 of the Laws of the State of New York for the year 1913, amending section 182 of chapter 33 of the Laws of the State of New York for the year 1909, constituting chapter 28 of the Consolidated Laws of the State of New York. And said L. M. C. Adams further said that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; that the signature of the said E. M. McCarthy subscribed to the said instrument is in the genuine handwriting of the said E. M. McCarthy and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Resident Vice-President.

H. E. EMMETT,
Notary Public.

Notary Public for Kings County No. 3.

Certificate filed in New York County No. 2, Nassau, Bronx, Queens, Richmond and Westchester Counties, Kings County Register's office No. 6002, New York County Register's Office No. 6097, Bronx County Register's Office No. 692.

Copy of By-Law.

Be it remembered: That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the sixth day of February, 1912, a quorum being present, the following By-Law was adopted:

Article XIII.

SECTION 1. Signatures required.—All bonds, recognizances, or contracts of indemnity, policies of insurance, and all other writings obligatory in the nature thereof, shall be signed by the President, a Vice-President, a Resident Vice-President, or Attorney-in-Fact, and shall have the seal of the Company affixed thereto, duly attested by the Secretary, an Assistant Secretary, or Resident Assistant Secretary. All Vice-Presidents and Resident Vice-Presidents shall each have authority to sign such instruments, whether the President be absent or incapacitated, or not, and the Assistant Secretaries and Resident Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent or incapacitated, or not; and the Attorneys-in-Fact shall each have authority, in the discretion of such Attorneys-in-Fact, to affix to such instruments an impression of the Company's seal, whether the Secretary

be absent or incapacitated, or not, or to attach the individual seal of the Attorney-in-Fact thereto, or to use the scroll of the Attorney-in-Fact, or a wafer, wax, or other similar adhesive substance affixed thereto, or a seal of paper or other similar substance affixed thereto by mucilage, or other adhesive substance, or use the word "seal" or the letters "l. s." opposite the signature of such Attorneys-in-Fact, as the case may be.

STATE OF NEW YORK,
County of New York, ss:

I, E. M. McCarthy, Resident Assistant Secretary of the National Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and the whole of said original By-Law.

Given under my hand and the seal of the Company, in the County of New York, this 3rd day of March, 1915.

[SEAL.]

E. M. McCARTHY,
Resident Assistant Secretary.

Approved March 4, 1915.

CHARLES E. HUGHES,
*Associate Justice of the Supreme Court
of the United States.*

135 [Endorsed:] The signature of the defendant, Clarence A. Crane, to the within bond is hereby waived. Dated, New York, March 3, 1915. Charles Albert Perkins, District Attorney of New York County.

136 Copy.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Court of Special Sessions of the First
[SEAL.] District of the City of New York, State of New York,
Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Special Sessions upon a remittitur from the Court of Appeals of the State of New York, Before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of New York, plaintiff, and Clarence A. Crane, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any

137 title, right, privilege or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said defendant, Clarence A. Crane, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourth day of March, in the year of our Lord one thousand nine hundred and fifteen.

(Signed)

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

Allowed to operate as a supersedeas, by

(Signed) CHARLES E. HUGHES,

Associate Justice of the Supreme

Court of the United States.

138 [Endorsed:] Supreme Court of the United States, October Term, 1914. Clarence A. Crane, Plaintiff in Error, vs. The People of the State of New York. Writ of error. Filed Court of Special Sessions, City of New York, N. Y. Co., March 6, 1915.

139 UNITED STATES OF AMERICA, *vs.*:

To the People of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Special Sessions of the First District of the City of New York, State of New York, wherein Clarence A. Crane is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles E. Hughes, Associate Justice of

the Supreme Court of the United States, this fourth day of March, in the year of our Lord one thousand nine hundred and fifteen.

CHARLES E. HUGHES,
*Associate Justice of the Supreme
Court of the United States.*

140 [Endorsed:] Service of a copy of the within citation is hereby admitted. Dated New York, March 6, 1915. Charles Albert Perkins, District Attorney, New York County, per L. Fabricant.

Endorsed on cover: File No. 24,606. New York Court of Special Sessions, First District, City of New York. Term No. 388. Clarence A. Crane, plaintiff in error, vs. The People of the State of New York. Filed March 8th, 1915. File No. 24,606.

IN THE
United States Supreme Court,

CLARENCE A. CRANE,
Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF
NEW YORK,
Defendant in Error.

SIR—Take Notice, that on the annexed affidavit of Edward M. Grout, verified the 5th day of March, 1915, and on all the papers and proceedings in this action, including the return of the Court of Special Sessions, of the First District, of the City of New York, the undersigned will apply to the United States Supreme Court, at a Session thereof to be held at the Capitol, in the City of Washington, District of Columbia, on Monday, March 8th, 1915, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, for an order setting down the argument of the writ of error herein and advancing the cause upon its calendar to such date as in its discretion may be proper, and for such

other and further relief as may be appropriate in the premises.

Dated, New York, March 5, 1915.

Yours, etc.,

EDWARD M. GROUT,
Attorney for Plaintiff in Error,
Office and Post Office Address,
115 Broadway,
Borough of Manhattan,
New York City.

To Hon. CHARLES A. PERKINS,
District Attorney of the
County of New York.

Short notice of the within motion is hereby accepted March 5, 1915.

Charles Albert Perkins

District Attorney of the County of New York,
Attorney for The People of the State of New
York.

IN THE SUPREME COURT OF THE UNITED
STATES.

CLARENCE A. CRANE,
Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF
NEW YORK,
Defendant in Error.

State of New York, }
County of New York, } ss.:

Edward M. Grout, being duly sworn, deposes and
says:

I am the attorney for Clarence A. Crane, plaintiff in error herein, who was defendant in the action instituted in the Court of Special Sessions of the First District of The City of New York, charging him with a crime, to wit: a misdemeanor under Section 14, Chapter 31 of the General Laws of the State of New York, and known as the Labor Law, prohibiting the employment of aliens upon public works in the State of New York by contractors performing contracts with the State or a municipality.

Said defendant was convicted upon the trial, and an appeal was taken to the Appellate Division of the Supreme Court, for the First Judicial Department, where said conviction reversed. Whereupon, the People duly appealed to the Court of Appeals, which reversed the decision and judgment of the Appellate Division, and directed the reinstatement

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of the judgment of conviction in the lower court, and upon the filing of its remittitur in said lower court said judgment of conviction was restored.

Thereafter said defendant, the plaintiff in error in this case, filed his petition in this court, for a writ of error to review said judgment, accompanied by his assignments of error, and on the 4th day of March, 1915, as deponent is informed and believes, this court ordered that a writ of error be allowed to have reviewed by this court the said judgment, and fixing the amount of the bond upon said writ of error, and ordering that all further proceedings in the said Court of Special Sessions be suspended and stayed pending said review and the decision thereon. Also, at the same time, the writ of error was duly allowed and a citation issued to the Court of Special Sessions as by law provided.

By Section 253 of the Judicial Code, being the Judiciary Act of Congress of the United States approved March 3, 1911, cases on writ of error to review the judgment of a State court in any criminal case shall have precedence on the docket of the Supreme Court of all cases to which the government of the United States is not a party, excepting only such cases as the court, in its discretion, may decide to be of public importance, but deponent believes that this case is of such great public importance and the results flowing from the decision thereupon in the State courts and the result of the determination of said case in this court are so momentous, that this Honorable Court should exercise its discretion and advance the hearing of said writ of error to the earliest possible date which it may be able to assign thereto.

Briefly, the reasons upon which deponent bases his said belief are as follows:

The section of the Labor Law of the State of New York in question became a law in substantially its present form seventeen (17) years ago, but has remained unenforced until the present time, and the opinion had generally prevailed throughout the State of New York that said law was unconstitutional and void.

Nevertheless, pursuant to the mandate of the law, all contracts for public works contained a provision that the said contracts should be void if the contractor should not comply with the said law and all monies earned under the contracts should be forfeited. Furthermore, the contractors are subject to prosecution and conviction as for a misdemeanor for such violations.

During the last few years, and particularly within the last ten (10) years, the City of New York has been engaged in building a system of subways, and at the present time has entered into contracts with various contractors for such work, which contracts are pending and incomplete and aggregate approximately One Hundred Fifty Million Dollars (\$150,000,000) in value. The contracts which are yet unadvertised and unawarded, are important links in the system, and upon the completion of these links depends the availability of almost the whole system.

By reason of inability of the contractors to procure sufficient citizen labor to do the lower grades of work, it has been necessary for the contractors to employ aliens, and deponent is informed that they have so employed aliens and that by reason of

long experience in said work they have acquired a peculiar skill and efficiency in doing the work which is necessary for its safe performance. As an illustration:

Deponent is informed that approximately twenty (20) miles of the streets of the City of New York are now excavated and underpinned, and that adjacent to such streets are continuous rows of high buildings valued at many thousands of millions of dollars which have to be shored up and supported pending the contractors' operations. Deponent is informed and believes, that this work is done by laborers known as "shorers," ninety per cent. (90%) of whom are aliens and who cannot be replaced by those who have no knowledge or skill in the work, if it were otherwise possible to procure citizens to do the work.

From the foregoing it appears that if the said section 14 of the Labor Law is held to be constitutional not only are the contractors subject to forfeiture of their contracts and the City of New York put to great expense in readvertising said contracts—possibly at greater prices and at a large aggregate in increased expenditure, but the actual safety of individuals and of the property of the community will be seriously endangered by the employment of unskilled citizens if they are procurable. Furthermore, it is inadvisable to let contracts for the remaining subway work until the question of the constitutionality of said law shall be determined.

The law in question affects not only the said subway work but all public work within the State of New York, including work on the barge canal.

Deponent respectfully states that the interests of the People of the State of New York, and the property and rights of a large body of citizens who have invested great sums of money in business enterprises, are involved in the final determination of their rights under the law, the validity of which is challenged by the writ of error herein, and a speedy adjudication of such questions is for that reason necessary.

For the foregoing reasons, deponent respectfully prays that this court may order the argument of this case advanced and the cause set down at such early date, as in the discretion of this court may seem proper, and that the plaintiff in error have such other and further relief as may be appropriate in the premises.

Edward M. Hunt

Sworn to before me, this
5th day of March, 1915.

Joseph Hensel
Notary Public Kings County
City of New York

(L.S.)



No. 8 388

Supreme Court of the United States,

OCTOBER TERM, 1914.

CLARENCE A. CRANE,
Plaintiff-in-error,

against

THE PEOPLE OF THE STATE OF
NEW YORK,
Defendant-in-error.

Office Supreme Court, U. S.

FILED

MAR 8 1915

JAMES D. MAHER

CLERK

**Memorandum Concurring in Motion
to advance.**

The defendant-in-error, while taking issue with the contentions of the plaintiff-in-error, that any meritorious Federal questions are involved in this case brought to this Court by writ of error, nevertheless concurs in the motion to advance the cause and urges that it be set down for a hearing at an early day upon the following grounds:

That the defendant is a contractor with the City of New York for the construction of an important public work, the speedy construction of which is essential to the people of said city, and that upon the decision in this case the validity of contracts involving millions of dollars and important public projects depend; that the work under these contracts has been to a large extent suspended pending the final decision of this controversy by this court.

Respectfully submitted,

CHARLES ALBERT PERKINS,
District Attorney,
New York County,
For Defendant-in-Error.

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1. His conviction was erroneous because it was based upon a violation of Section 14 of Chapter 36 of the Laws of 1909 of the State of New York, known as the Labor Law, which law was void, being in conflict with Section 1 of the Fourteenth Amendment of the United States Constitution which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."	4
Said Section 14 of the Labor Law did abridge the privileges and immunities of plaintiff in error a citizen of the United States and of his alien employees by depriving them of their right to contract for labor, and the State of New York, by enacting said law and enforcing its provisions against plaintiff in error deprived him and his said employees of liberty and property without due process of law and denied to them the equal protection of the laws. The Court of Special Sessions, and the Court of Appeals, of the State of New York erred in holding to the contrary.	
2. The conviction was erroneous because it was based upon a violation of Section 14 of Chapter 36 of the Laws of 1909 of the State of New York, known as the Labor Law, which law was void, being in conflict with subdivision 2 of Article VI of the United States Constitution which provides that "this Constitution and the Laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Pursuant to said article treaties had been entered into by the United States with various nations including Italy, which treaties were in effect at the time of the act complained of and at the time of his conviction, and which put aliens within the State of New York upon an equality with citizens of	5

the state with respect to the right to labor upon public works, and Congress had pursuant to said Section duly enacted a law (Revised Statutes, Sec. 1977) granting to all persons within the jurisdiction of the United States the same right in every state and territory to make and enforce contracts as is enjoyed by white citizens. Said treaties and said law nullified the provisions of said Section 14 of the Labor Law, and the Court of Special Sessions, and the Court of Appeals, of the State of New York, erred in holding to the contrary.

Points—

Point I.—The Fourteenth Amendment of the United States Constitution, either *ex proprio vigore*, or by virtue of treaties entered into, and laws of Congress enacted, pursuant to the provisions of Article VI of the Constitution, has granted to resident aliens in the State of New York an equal right with citizens of that State to contract to labor upon the public works of the State, and chapter 14 of the Labor Law of the State, being in contravention of that right, was and is unconstitutional and void, and the conviction of plaintiff in error for violation thereof was error, and should be set aside. 6

(a) Authority for this law does not lie in the police power. 16

(b) The distinction between citizens and aliens is insufficient to justify the act. 26

(c) Nor is freedom to contract sufficient justification for the law. 28

(d) Section 14 of the Labor Law violates the Fourteenth Amendment of the Constitution of the United States, reinforced as it is by section 1977 of the Revised Statutes. 31

(e) Section 14 of the Labor Law also violates treaties duly entered into by the United States Government with foreign nations, and Section 1977 of the Revised Statutes. 43

Point II.—The contract agreement to comply with the law falls with the law itself. 66

Point III.—The fact that the Legislature of the State of New York after the conviction of plaintiff in error amended section 14 of the Labor Law, does not militate against the rights of the plaintiff in error in this Court. 68

Point IV.—The conviction of plaintiff in error should be reversed and the case remanded to the Court of Special Sessions of The City of New York for appropriate action. 69

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Supreme Court of the United States.

OCTOBER TERM, 1915.

Clarence A. Crane,
Plaintiff in error,
against

The People of the State of New
York,

File No. 24606.

In error to the Court of Special Sessions—First District,
City of New York—State of
New York.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The plaintiff in error seeks to review upon writ of error to this Court (page 84) a judgment (page 3) of conviction for a misdemeanor in violating Section 14 of Chapter 36 of the Laws of 1909 of the State of New York (known as the Labor Law), by employing aliens in the performance of his contract for the construction of a public work for the City of New York, a municipal corporation of said State. The conviction was upon undisputed facts after a trial (pages 8-12) in the Court of Special Sessions of the City of New York in the State of New York. The issues are solely upon the law.

Said Section fourteen of the Labor Law at the time of conviction read as follows:

“Section 14. Preference in employment of persons upon public works. In the construc-

tion of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the state of New York. In each contract for the construction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void. All boards, officers, agents or employees of cities of the first class of the state, having the power to enter into contracts which provide for the expenditure of public money on public works, shall file in the office of the commissioner of labor the names and addresses of all contractors holding contracts with said cities of the state. Upon letting of new contracts the names and addresses of such new contractors shall likewise be filed. Upon the demand of the commissioner of labor a contractor shall furnish a list of the names and addresses of all subcontractors in his employ. Each contractor performing work for any city of the first class shall keep a list of his employees, in which it shall be set forth whether they are naturalized or native born citizens of the United States, together with, in case of naturalization, the date of naturalization and the name of the court where such naturalization was granted. Such lists and records shall be open to the inspection of the commissioner of labor. A violation of this section shall constitute a misdemeanor and shall be punishable by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment for not less than thirty nor more than ninety days, or by both such fine and imprisonment."

Defendant Crane appealed to the Appellate Division of the Supreme Court of the State of New York, First Department, from said conviction (page 3). The said Appellate Division unanimously reversed the judgment of conviction, holding in substance that the act was unconstitutional and void, being in conflict with both the State and Federal constitutions, in that it deprived the excluded aliens of their liberty and property without due process of law and denied to them the equal protection of the law. In view of its determination and the grounds thereof, the said Appellate Division declined to consider the question raised on the appeal whether the said act was void because in contravention of treaties between the United States and foreign countries, and of subdivision 2 of Article VI of the Federal Constitution, and laws passed under authority thereof (pages 33, 34-43).

By leave of the Appellate Division (pages 33-34) the People appealed to the Court of Appeals of the State of New York from its decision reversing said judgment of conviction. The Court of Appeals reversed the decision of the Appellate Division, and sustained the conviction. Three prevailing opinions were written, each upon different grounds, six judges concurring in the decision (pages 45-62). Judge Collin wrote a dissenting opinion (pages 62-70).

On remittitur from the Court of Appeals the said judgment was ordered by the Court of Special Sessions to be enforced (pages 71-72), and plaintiff in error petitioned this court for a writ of error to review said judgment and for a stay (pages 72-76), assigning errors (pages 76-81), and thereupon the writ of error issued (pages 76, 84-85) and a supersedeas was granted (page 85) and the proceedings brought into this court for consideration (pages 85-86).

It was proved upon the trial that on November 24, 1914, being then a contractor employed in performing a contract with the City of New York, a municipal corporation of the State of New York, for the construction of a public work, to wit: a sewer basin in said city, plaintiff in error knowingly employed three persons upon said work, none of whom was then a citizen of the United States, and one of whom was a subject of the King of Italy (pages 8-12).

He denies that thereby he committed a crime under Section 14 of the Labor Law, and asserts that said law is unconstitutional and void, being in contravention of the Federal constitution and Acts of Congress enacted in pursuance thereof, and treaties of the United States with foreign countries.

Specification of Errors Relied Upon.

Plaintiff in error will rely upon and argue the following errors:

1. HIS CONVICTION WAS ERRONEOUS BECAUSE IT WAS BASED UPON A VIOLATION OF SECTION 14 OF CHAPTER 36 OF THE LAWS OF 1909 OF THE STATE OF NEW YORK, KNOWN AS THE LABOR LAW, WHICH LAW WAS VOID, BEING IN CONFLICT WITH SECTION 1 OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHICH PROVIDES THAT "NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW, NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS."

SAID SECTION 14 OF THE LABOR LAW DID ABRIDGE THE PRIVILEGES AND IMMUNITIES OF PLAINTIFF IN ER-

ROR A CITIZEN OF THE UNITED STATES AND OF HIS ALIEN EMPLOYES BY DEPRIVING THEM OF THEIR RIGHT TO CONTRACT FOR LABOR, AND THE STATE OF NEW YORK, BY ENACTING SAID LAW AND ENFORCING ITS PROVISIONS AGAINST PLAINTIFF IN ERROR DEPRIVED HIM AND HIS SAID EMPLOYES OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW AND DENIED TO THEM THE EQUAL PROTECTION OF THE LAWS. THE COURT OF SPECIAL SESSIONS, AND THE COURT OF APPEALS, OF THE STATE OF NEW YORK ERRED IN HOLDING TO THE CONTRARY.

2. THE CONVICTION WAS ERRONEOUS BECAUSE IT WAS BASED UPON A VIOLATION OF SECTION 14 OF CHAPTER 36 OF THE LAWS OF 1909 OF THE STATE OF NEW YORK, KNOWN AS THE LABOR LAW, WHICH LAW WAS VOID, BEING IN CONFLICT WITH SUBDIVISION 2 OF ARTICLE VI OF THE UNITED STATES CONSTITUTION WHICH PROVIDES THAT "THIS CONSTITUTION AND THE LAWS OF THE UNITED STATES, WHICH SHALL BE **MADE IN PURSUANCE THEREOF**, AND ALL TREATIES MADE, OR WHICH SHALL BE MADE, UNDER THE AUTHORITY OF THE UNITED STATES, SHALL BE THE SUPREME LAW OF THE LAND; AND THE JUDGES IN EVERY STATE SHALL BE BOUND THEREBY, ANYTHING IN THE CONSTITUTION OR LAWS OF ANY STATE TO THE CONTRARY NOTWITHSTANDING." PURSUANT TO SAID ARTICLE TREATIES HAD BEEN ENTERED INTO BY THE UNITED STATES WITH VARIOUS NATIONS INCLUDING ITALY, WHICH TREATIES WERE IN EFFECT AT THE TIME OF THE ACT COMPLAINED OF AND AT THE TIME OF HIS CONVICTION, AND WHICH PUT ALIENS WITHIN THE STATE OF NEW YORK UPON AN EQUALITY WITH CITIZENS OF THE STATE WITH RESPECT TO THE RIGHT TO LABOR UPON PUBLIC WORKS, AND CONGRESS HAD PURSUANT TO SAID SECTION DULY ENACTED A LAW (REVISED STATUTES, SEC. 1977) GRANTING TO ALL PERSONS WITHIN THE JURISDICTION OF THE UNITED STATES THE SAME RIGHT IN EVERY STATE AND TERRITORY TO MAKE AND EN-

FORCE CONTRACTS AS IS ENJOYED BY WHITE CITIZENS. SAID TREATIES AND SAID LAW NULLIFIED THE PROVISIONS OF SAID SECTION 14 OF THE LABOR LAW, AND THE COURT OF SPECIAL SESSIONS, AND THE COURT OF APPEALS, OF THE STATE OF NEW YORK, ERRED IN HOLDING TO THE CONTRARY.

Upon the facts shown by the transcript of the record, hereinbefore epitomized, and upon the foregoing assignments of error plaintiff in error makes the following points:

POINT I.

The Fourteenth Amendment of the United States Constitution, either *ex proprio vigore*, or by virtue of treaties entered into, and laws of Congress enacted, pursuant to the provisions of Article VI. of the Constitution, has granted to resident aliens in the State of New York an equal right with citizens of that State to contract to labor upon the public works of the State, and chapter 14 of the Labor Law of the State, being in contravention of that right, was and is unconstitutional and void, and the conviction of plaintiff in error for violation thereof was error, and should be set aside.

We deem it unnecessary to discuss separately the force and effect of the Fourteenth Amendment apart

from that of treaties entered into, and laws enacted, pursuant to Article VI of the Constitution. For it is apparent that if the law in question is repugnant to the rights granted by either it is void; also that while said Fourteenth Amendment may not *ex proprio vigore* be in conflict with said Labor Law, yet if, by the provisions of treaties entered into or laws enacted pursuant to Article VI of the constitution the equal rights granted by the Fourteenth Amendment are extended to aliens, the same result is effected.

We will be aided in understanding the problem before us if we consider what was actually decided by the Court of Appeals of the State of New York.

The majority of the learned Judges of the Court of Appeals, in sustaining the constitutionality of the act in question, were, we believe, misled into drawing an unwarranted conclusion of law from certain well established, though unrelated, legal premises.

Their syllogia may be summarized as follows:

(a) The moneys of the State belong to the people of the State (opinion of Cardozo, p. 46). The People of the State constitute the state and its members are its citizens, and aliens are excluded from such membership (opinion Cardozo, p. 46).

(b) Every citizen has a like interest in the application of the public wealth to the common good, and although the Government in expending the citizens' money may not by arbitrary discrimination further the employment of one class of citizens to the discouragement of the employment of other classes of citizens, yet an alien has no such interest (opinion of Cardozo, p. 47).

(c) The power of a State to discriminate between citizens and aliens in the distribution of its

own resources has been approved by the courts and long time custom. To better the condition of its citizens, and perhaps to prevent pauperism, the legislature has declared that the moneys of the State shall go to the people of the State (opinion of Cardozo. pp. 47-8).

(d) While the Government of the State concededly cannot deny to aliens the right to engage in private trades on equality with citizens, and cannot in its public capacity pass laws regulating private business by barring aliens from the right to trade and labor (opinion of Cardozo, pp. 51-52), nevertheless the Government may in its capacity as a proprietor issue a mandate to its own agents and thereby bar aliens from the right to labor on works prosecuted by it in its private capacity (opinion of Cardozo, p. 52).

(e) The Courts have declared that the State in the prosecution of a public work stands in just the same position as an individual, and may in such capacity prescribe the conditions on which it will contract for such work, and make a violation of his contract by the contractor a criminal offense (opinion of Bartlett pp. 54-5). It is not a right of citizenship to be employed upon public works, and the State may discriminate as between its own citizens, and therefore may discriminate as against aliens (opinion of Seabury, p. 57).

(f) The power of control of public works by the State is an exercise of the Police Power, and as owner and proprietor the State may say who may labor upon its public works (opinion of Seabury, pp. 59-61).

(g) The law in question does not violate any treaties, because the treaties cannot control the State in the exercise of its proprietary right over

its own works (Opinion of Cardozo, p. 52; opinion of Seabury, pp. 61-62).

Each of the foregoing propositions contains its modicum of truth. But under the Federal Constitution the assigned conclusion does not follow from the established premises, as we trust we shall be able to show.

While the people of the State constitute the State and its members are its citizens (*Penhallow vs. Doanes' Adms.*, 3 Dallas, 54, 93; *Texas vs. White*, 7 Wall., 700; *United States vs. Cruikshank*, 92 U. S., 542) and while aliens are not constituents of such membership, the control of the State over the property of its citizens is by no means absolute.

The power of taxation, which has been held to be the very essence of the governing power, is not unlimited. Mr. Justice Miller defined this limitation in *The Citizens Savings and Loan Ass'n vs. Topeka*, 87 U. S., 655, a case coming to this Court from Kansas wherein was brought in question the validity of a law authorizing municipal aid to private corporations:

"If these municipal corporations, which are in fact subdivisions of the State, and which for many reasons are vested with quasi legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the Legislature of the State to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of this kind for a particular use, as public worship or charity, the Legislature may pass laws authorizing them to make contracts in reference to this property and incur debts payable from that source."

The learned Justice went on to discuss the decisions in various States relative to the power of the Legislature to authorize the sale of bonds to aid railroads, and continued:

"We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the State Legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power and was an unauthorized invasion of private rights. * * * It must be conceded that there are such rights in every free government beyond the control of the State. * * * The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. * * * There are limitations on such powers which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. * * * To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

The power of the State over the public property is no more absolute. A present legislative body cannot abdicate its authority, nor foreclose a suc-

ceeding Legislature from action in the same matter, nor can the State permanently relinquish the trust vested in it to control and manage the public property.

“The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining”
(*Illinois vs. Ill. C. R. R. Co.*, 146 U. S., 386).

Nor can the State recall powers vested in a municipality in such a way as to impair the obligation of contracts. While

“a municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature”
(*Williams vs. Eggleston*, 170 U. S., 303),

the dual character of a municipality, the one sovereign and the other private or corporate is well established.

Dillon on Mun. Corps. (5th Ed.),
Vol. 1, Secs. 108-111, 113-116, 118-120, 132.

In *People ex rel. Le Roy vs. Hurlburt*, 24 Mich., 44, Judge Cooley says (pages 103, 108):

“Conceding to the state the authority to shape the municipal organizations at its will, it would not follow that a similar power of

control might be exercised by the state as regards the property which the corporation has acquired, or the rights in the nature of property which have been conferred upon it. * * *

The municipality, as an agent of government, is one thing; the corporation, as an owner of property, is in some particulars to be regarded in a very different light. The Supreme Court of the United States held at an early day that grants of property to public corporations could not be resumed by the sovereignty (*Terrett vs. Taylor*, 9 Cranch, 43; *Town of Pawlet vs. Clark*, *ibid* 292; and see *Dartmouth College vs. Woodward*, 4 Wheat, 694-698. * * *

In *Detroit vs. Corey*, 9 Mich., 195, Manning, J., bases his opinion that the city was liable for an injury to an individual, occasioned by falling into an excavation for a sewer, carelessly left open, upon the fact that the sewers were the private property of the city, in which the outside public or people of the state at large had no concern. * * *

Other cases might be cited. * * *

They rest upon the well understood fact that these corporations are of a two-fold character; the one public as regards the state at large, in so far as they are its agents in government; the other private, in so far as they are to provide the local necessities and conveniences for their own citizens; * * *

The State may mould local institutions according to its views of policy or expediency; but local government is matter of absolute right; and the state cannot take it away. * * *

The same doctrine was stated in *State of Wisconsin vs. Haben*, 22 Wisc., 660; repeated by Judge Allen in *Proprietors of Mount Hope Cemetery vs. Boston*, 158 Mass., 509; and emphasized in *Webb vs. The Mayor*, 64 *Howards Practice* (N. Y.), 10.

There is, also, over and above express checks, the vague, but nevertheless substantial and formidable, check to legislation which Justice Miller styled, in the excerpt from the case of *Savings Bank vs. Topeka*, from which we have already quoted,

“limitations * * * which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist * * *.”

And finally the States have voluntarily, deliberately, and irrevocably given up for the common national advantage certain attributes of sovereignty, and have vested in the national legislative body and its executive certain powers of action which preclude the exercise of similar powers in the States, and at the same time have solemnly covenanted that any state action conflicting with such ceded powers shall be null and void (*Penhallow vs. Doane's Admx.*, 3 Dallas, 54; *Texas vs. White*, 7 Wall, 720; *United States vs. Cruikshank*, 92 U. S., 542; *Choe Chan Ping vs. United States*, 130 U. S., 581; *Gibbons vs. Ogden*, 9 Wheat, 1; *Cohens vs. Virginia*, 6 Wheat, 264).

In *United States vs. Cruikshank* (*supra*), the court says:

“We have in our political system a government of the United States and a government of each of these several states. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States, and a citizen of a state, but his rights of citizenship under one of those governments will be different from those he has under the other (*Slaughter House Cases*, 16 Wall, 74).”

Then speaking of the general government, the court says:

"The government thus established and defined is to some extent a government of the states in their political capacity. It is, also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the states * * *.

"The people of the United States resident within any state are subject to two governments, one State and the other National, but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions."

In *Cohens vs. Virginia* (*supra*), Chief Justice Marshall said (page 414):

"In many other respects, the American people are one; and the Government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be in many respects and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared that in the exercise of all powers given for these objects it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The Constitution and laws of a state, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These states are constituent parts

of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate.”

With such a system of checks and balances it is not surprising that those who have fondly believed that law is an exact science have been confounded and confused by the innumerable, and in many cases apparently irreconcilably conflicting, decisions of our courts with respect to the constitutional limitations of the sovereign powers of the State.

Thus of the police power of the states, which Chief Justice Taney, in *License Cases*, 5 Howard, 504, declared to be (page 583)

“nothing more or less than the powers of government inherent in every sovereignty,”

a Justice of this court said in *Noble State Bank vs. Haskell*, 219 U. S., 104:

“With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides.”

This same rule was somewhat more elaborately stated in *Hudson County Water Co. vs. McCarter*, 209 U. S., 349:

“All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but

points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain."

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"It constantly is necessary to reconcile and to adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of others, as we already have said that it is necessary to reconcile and to adjust different principles of the common law. See *Asbell vs. Kansas* (209 U. S. 251, ante, 778, 28 Sup. Ct. Rep. 485)."

By such process of delineation coupled with abstract reasoning, and aided, but not controlled, by prior decisions, we believe the correct solution of the issue here involved will be found.

(a) **AUTHORITY FOR THIS LAW DOES NOT LIE IN THE POLICE POWER.**

We respectfully suggest that the learned Judges of the Court of Appeals by no means fortified their decision by attempting to find in the police power the authority of the legislature to enact the statute in question.

For the police power of the state, like all other state powers, has its limits. While its depths may never have been plumbed, its boundaries have been well defined. It is bounded on one side by the United States Constitution, and on the other by the necessity of establishing that its exercise is required for the preservation of the health, morals or good order of the community.

Judge Cardozo in his opinion in this case, refers to the decision of Justice Brewer in *State vs. Osawkee*, 14 Kan. 419, in support of his suggestion (we can call it no more) that the discrimination of the statute against aliens is justified by the possibility that thereby it may prevent pauperism among the citizens of the State. We doubt whether a careful reading of the very learned and persuasive opinion in that case will justify that conclusion. The act in question authorized towns to issue bonds to raise money to loan to farmers to purchase grain for seed and for feed. The Court, by Justice Brewer, said (pages 423-5, 427) :

"The purpose of the act * * * is to provide the destitute with provisions, and with grain for seed and feed * * *. Its aim is not to furnish food to the hungry, clothing to the naked, or fuel to those suffering from cold. It is not the helpless and dependent whose wants are alone sought to be relieved. * * * It taxes the whole community to assist one class, and that, not for the purpose of relieving actual want, but to assist them in their regular occupations. These people are engaged in the business of farming. * * * They are destitute of seed, and their stock require grain. Hence the tax upon the community. * * * Were the carpenters or shoemakers, or any other industrial class, located in a separate quarter of a city, and their tools and stock in

trade swept away by fire, could a tax be sustained to purchase new sets of tools, and new stock in trade * * * ? * * * But it may be said that this legislation can be defended as *preventive and anticipatory*. * * * Grant that these parties are not now helpless and dependent; that they are not a public charge. Unless they are able to make and harvest a crop they may become so the ensuing winter. Is it not the part of wisdom to expend a little now to purchase seed and feed, rather than run the risk of having them become paupers hereafter? * * * Let the doorways of taxation be opened, not merely to the relief of present and actual distress, but in anticipation of and to guard against future want, and who can declare the result? How certain must be the expectation of want? How nigh its approach? * * * Must widespread and general calamity precede the granting of such anticipatory relief; or is it enough that individual misfortune or indolence render probable the approach of want? The mere mention of these questions suggests the dangers which would follow the adoption of this as a rule of public conduct."

This decision, which was in point of time nearly contemporaneous with the decision of this court in *Citizens Savings Ass'n vs. Topeka*, hereinabove cited, declares the same principle, and is, we submit, based upon reason and authority.

In *Henderson et al vs. Wickham*, 92 U. S. 259, it was said:

" * * * assuming that, in the formation of our government, certain powers necessary to the administration of their internal affairs are reserved to the states, and that among these

powers are those for the preservation of good order, of the health and comfort of the citizens, and their protection against pauperism and against contagious and infectious diseases, and other matters of legislation of like character, they insist that the power here exercised falls within this class, and belong rightfully to the states.

"This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it and no urgency for its use can authorize a state to exercise it in regard to a subject matter which has been confided exclusively to the discretion of Congress by the Constitution.

"Nothing is gained in the argument by calling it the police power. Very many statutes, when the authority on which their enactments rest is examined, may be referred to different sources of power, and supported equally well under any of them. A statute may, at the same time, be an exercise of the taxing power and of the power of eminent domain. A statute punishing counterfeiting may be for the protection of the private citizen against fraud, and a measure for the protection of the currency and for the safety of the government which issues it. It must occur very often, that the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable.

"But, however difficult this may be, it is clear from the nature of our complex form of government, that, whenever the statute of a state invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the states."

In *New Orleans Gas Light Co. vs. Louisiana Light etc Co.*, 115 U. S. 650, this Court said:

"That there is a power, sometimes called the police power, which has never been surrendered by the States, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals or the public safety, is conceded in all cases. *Gibbons vs. Ogden*, 9 Wheat. 203 (22 U. S. bk. 6, L. ed. 71). In its broadest sense, sometimes defined, it includes all legislation and almost every function of civil government. *Barbier vs. Connolly*, 113 U. S. 31 (Bk 28, L. ed. 924). As thus defined, we may, not improperly, refer to that power the authority of the state to create educational and charitable institutions, and provide for the establishment, maintenance and control of public highways, turnpike roads, canals, wharves, ferries and telegraph lines, and the draining of swamps. Definitions of the police power must, however, be taken subject to the condition that the state can not in its exercise, for any purpose whatever, encroach upon the powers of the General Government, or rights granted or secured by the supreme law of the land.

"Illustrations of interference with the rightful authority of the General Government by the state legislation—which was defended upon the ground that it was enacted under the police power—are found in cases where enactments concerning the introduction of foreign paupers, convict and diseased persons, were held to be unconstitutional, as conflicting, by their necessary operation and effect, with the paramount authority of Congress to regulate commerce with foreign nations, and among the several States. In *Henderson etc. vs. Mayor of New York*, 92 U. S. 263 (Bk. 23, L. ed. 543). the court, speaking by Mr. Justice Miller, while declining to decide whether in the absence of action by Congress the States can, or how far they may, by appropriate legislation protect themselves against actual paupers, vagrants, criminals and diseased persons, arriving from foreign countries, said that no definition of the police power, and 'no urgency for its use can authorize a state to exercise it in regard to a subject matter which has been confided exclusively to the discretion of Congress by the Constitution.' *Chy Lung vs. Freeman*, 92 U. S. 276 (Bk. 23 L. ed. 550). And in the *Railroad Company vs. Husen*, 95 U. S. 474 (Bk. 24, L. ed. 531), Mr. Justice Strong, delivering the opinion of the court, said that 'the police power of a state can not obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it, objects not within its scope, can not be secured at the expense of the protection afforded by the Federal Constitution.'

"That the police power, according to its largest definition, is restricted in its exercise by the National Constitution, is further shown by those cases in which grants of exclusive

privileges respecting public highways and bridges over navigable streams have been sustained as contracts, the obligations of which are fully protected against impairment by state enactments." * * *

In *Holden vs. Hardy*, 169 U. S. 366, the police power was carefully defined:

"This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precaution for their well being and protection, or the safety of adjacent property. While this court has held notably in the cases of *Davidson vs. New Orleans*, 96 U. S. 97 (24:616), and *Yick Wo. vs. Hopkins*, 118 U. S. 356 (30:220), that the police power can not be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion 'is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.' *Lawton vs. Steele*, 152 U. S. 133, 136 (38:385, 388)."

In *Jacobson vs. Mass.* 197 U. S. 11, compulsory vaccination was under consideration. The court said:

"The authority of the state to enact this statute is to be referred to what is commonly

called the police power—a power which the state did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and “health laws of every description,” indeed all laws that relate to matters completely within its territory, and which do not by their necessary operation affect the people of other states. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”

* * * * *

“A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures (*Gibbons vs. Ogden*, 9 Wheat, 1, 210; *Sinnot vs. Davenport*, 22 How., 227, 243; *Missouri K. & T. R. Co. vs. Haber*, 169 U S., 613, 626).”

* * * * *

“In *Crowley vs. Christensen*, 137 U. S., 86, 89, we said: ‘The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will. It is only freedom

from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.'

* * * * *

" ' Before closing this opinion, we deem it appropriate, in order to prevent misapprehension as to our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—that the police power of a state, whether exercised directly by the legislature or by a local body acting under its authority, may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression.' "

In *Lochner, vs. New York*, 198 U. S., 45, in considering a statute regulating hours of labor in bakeries, this court defined the police power as follows:

" Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public."

It appears from the foregoing that the police power is not in itself a sufficient answer to the challenge of the legality of Section 14 of the Labor Law. Indeed, Judge Cardozo, in his opinion, seemed to apprehend that fact, for he said:

" To disqualify citizens from employment on the public works is not only discrimination, but arbitrary discrimination " (page 47).

He bases his argument, therefore, not on the police power, but on the distinction between citizens and aliens, saying:

" To disqualify aliens is discrimination indeed but not arbitrary discrimination, for the

principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state" (page 47).

He says again :

"In thus holding that the power exists to exclude aliens from employment on the public works, we do not, however, commit ourselves to the view that the power exists to make arbitrary distinctions between citizens. We do not hold that the government may create a privileged caste among the members of the state" (page 51).

On the other hand, Judge Seabury makes the broad assertion (page 60) that the state has

"the right to employ certain citizens to the exclusion of others and the citizens not so employed are not in any legal sense unlawfully discriminated against."

We think that this court will be surprised to see that this doctrine is attributed to the decision in *Atkin vs. Kansas*, 191 U. S., 207. If we have read that case correctly we are justified in asserting that this court did not therein intend to overturn its long-time decisions to the contrary; and contented itself with holding that the State, as a contractor, had the right to establish and enforce the *conditions* upon which *any* person could bid for, receive, and execute a contract for public works. We find in that decision no ruling, and no dictum, that the State may arbitrarily establish a preferred class of citizens who may exercise the privilege of contracting for, and working upon, public works.

The police power has been held to justify certain discriminations between citizens in limited and well defined instances where the public interest required it; requiring certain qualifications before

exercising a profession; limiting the manner, or time, of labor when the health or the safety of the community or of the laborer necessitated it; even limiting or prohibiting a specified business where it is concededly one not calculated to foster the public welfare; or controlling the manner of carrying on, or the profits of, a business which may be quasi public. Instances of such regulation are too common and well established to require citation.

But we challenge citations of a case where the State has been held justified in prohibiting to certain of its citizens any trade or calling which is in itself innocuous, and which is not such that the community has an interest in its performance.

Surely no justification could be sought or found for an attempted limitation by the State to a selected class of citizens of the right to labor in a ditch with a pick and shovel, even if the hole thereby created were intended by the State to contain either a sewer or the foundations of a court house.

We must look beyond the Police Power for the justification of this statute.

(b) THE DISTINCTION BETWEEN CITIZENS AND ALIENS IS INSUFFICIENT TO JUSTIFY THE ACT.

But it is said that no further justification is necessary except the fact that the included are citizens and the excluded are aliens.

In support of this proposition there are cited the undoubted authority of the State to limit the capture and use of wild game, and all natural resources, to citizens; the State's equally conceded right to refuse to license an alien to sell liquor; its historic right to refuse to permit aliens to own or inherit real estate (unless the right is granted by treaty); its more doubtful, but nevertheless estab-

lished, right in some jurisdictions to make "alienage" synonymous with "suspicious," justifying discrimination in the granting of licenses to peddle.

The first named is founded upon the common ownership by all citizens (*Commonwealth vs. Hilton*, 174 Mass., 29; *McCready vs. Virginia*, 94 U. S., 391; *People vs. Lowndes*, 130 N. Y., 455; *Geer vs. Connecticut*, 161 U. S., 519; *Patson vs. Pennsylvania*, 233 U. S., 138); the second is a mere corollary of the fact that the State may under the police power prohibit entirely the selling of liquor, or grant the privilege to whomever it chooses (*Bloomfield vs. State*, 86 Ohio St., 253; *Trageser vs. Gray*, 73 Md., 250; *Bartemeyer vs. Iowa*, 18 Wall, 129; *Crowley vs. Christensen*, 137 U. S., 86); the third is a survival of the common law (*Blythe vs. Hinckley*, 180 U. S., 333, *Freund on Police Powers*, Sec. 705); and the fourth is also based upon the police power as exercised to protect the morals of the community (*Commonwealth vs. Hana*, 195 Mass., 262). Equal authority, and it seems to us more cogent reasoning, denies this power (*State vs. Montgomery*, 94 Maine, 192), and for the purposes of the present discussion the decision in *Commonwealth vs. Hana* is of no aid to those who assert that alienage is in itself a sufficient ground for discrimination. In that case, the Court, in speaking of the Fourteenth Amendment, said:

"It is decided that this provision applies to aliens as well as to citizens of the United States, and it is clear that a statute arbitrarily forbidding aliens to engage in ordinary kinds of business to earn their living would be unconstitutional and void. *Yick Wo vs. Hopkins*, 118 U. S., 356; *In re Ar Chong*, 2 Fed. Rep., 733; *In re Lee Sing*, 43 Fed. Rep., 359; *Pearson vs. Portland*, 69 Maine, 272."

This court in *Yick Wo vs. Hopkins*, 118 U. S., 356, which we shall have occasion to refer to more fully at a later point in this brief, effectually negated the notion that alienage in itself may furnish a just excuse for the exercise of discrimination against following the ordinary occupations of life. The defenders of section 14 of the Labor Law of the State of New York must look further for its justification.

(c) NOR IS FREEDOM TO CONTRACT SUFFICIENT
JUSTIFICATION FOR THE LAW.

But, they say, if there is no other reason, the fact that any person about to award a contract may employ whom he will, and exact such conditions as he wishes, not inconsistent with fundamental law, justifies the State as a contractor in doing the same thing. And they add that if as such contracting party the State desires to exclude aliens from participating in its contract work, it may make a violation of the contract agreement not to employ aliens a crime, and punish it as such.

If the question were open we would be glad to debate the latter proposition, and marshal the numerous cases in which it has been held that a breach of a contract cannot be made a crime, but we assume that the decisions of this court in *Atkin vs. Kansas*, 191 U. S., 207, and *Ellis vs. United States*, 206 U. S., 246, have settled that question. We concede, therefore, that if the State of New York had the power to prohibit the plaintiff in error from employing aliens in the performance of his contract, it had the power to make a violation of his covenant a crime, and to punish it as such.

Upon the first proposition, that the State as a contractor is on a par with any individual, and may by law exact any condition of the performance of its

contract which might be exacted by an individual, we most decidedly dissent.

In making such assertion its proponents lose sight of the fact that the state, though a contractor, is still a sovereign, and as such sovereign is bound by rules of procedure established by its constitution, by the constitution and laws of the United States, and by the fundamental rules and limitations to which we have already adverted, which constrain it to limit its caprice and check its whims in consonance with fundamental principles of justice and equity.

Common illustrations are easily cited. The State of New York may not loan its credit to or in aid of any individual association or corporation (*Constitution, Article 7, Section 1*). An individual may do so. The State may not create a debt except by vote of the people (*Constitution, Article 7, Section 4*). The individual is not thus limited. The Legislature is prohibited from giving any extra compensation to a contractor with the State (*Constitution, Article 3, Section 28*). But an individual may do so. Municipal corporations by their charters are required to award contracts of any material amount only after competitive bidding, and to the lowest bidder. An individual may contract when and with whom he will. Doubtless an individual might elect to employ only red headed men, but should the State impose the same obligation by law upon its subordinates we cannot suppose that such law would be sustained, because other citizens would justly claim that it was an arbitrarily unjust discrimination not based upon any good reason.

The right of an individual to contract is bounded only by the limitation that he shall not interfere with the rights of others, and shall not contract to do or have done, anything inimical to the morals, peace or good order of the community.

Congress cannot impose upon individuals any material limitations upon their life, liberty or property, including the right to contract (*Adair vs. United States*, 208 U. S., 161), but it has frequently been sustained in the exercise of its right to prohibit the State from enacting laws which trespassed upon rights vested in the National Government.

It may be conceded that the Superintendent of Public Works of the State of New York, *unrestrained by law*, may employ whom he will to drive the automobile used by him on State business, and in the exercise of that right may register his liking for red headed men, or his objection to alien employees. But this right does not advance a single step the argument that because he may do so, he may be authorized by law, or compelled by law, to employ a red headed man, or to refuse to employ an alien, as his chauffeur.

It may be conceded that the State may in its contractual capacity do the same in the matter of those employed by it upon its barge canal, but that concession does not carry with it the right to *enact a law requiring* such discrimination.

The reason for this is plain. New York State when it became a member of the United States of America solemnly covenanted with all other states that certain powers and authority were vested by them jointly in the Government of the United States; that in the exercise of those powers, and of that authority, the national government should be supreme; that it would not enact any laws (constitutional or legislative) which would tend to limit such ceded rights and authority; and that if it did do so such laws should be void.

In the last analysis, therefore, this court must determine whether Section 14 of the Labor Law of the State of New York is violative of any power

vested in, or duly exercised by, the National Government, or of any law passed by Congress pursuant to the Constitution of the United States.

(d) SECTION 14 OF THE LABOR LAW VIOLATES THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, REINFORCED AS IT IS BY SECTION 1977 OF THE REVISED STATUTES.

In considering this and succeeding questions arising under the Constitution we must bear in mind that one of the first things that this Court decided was that the Constitution is not a document of limited authority and it is not to be strictly construed.

In *Gibbons vs. Ogden*, 9 Wheat., 1, Chief Justice Marshall said:

“As preliminary to the very able discussions of the Constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

“This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly the means of carrying all others into execution, Congress is authorized ‘to make all laws which shall be necessary and proper’ for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the Constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do the gentlemen mean by strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. As men, whose inten-

tions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can inure solely to the benefit of the grantee, but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.

Among the "unlimited" powers conferred upon the Nation, are those vested in Congress by *Article 1, Section 8, Subdivisions 3, 4 and 18*:

"3. To regulate commerce with foreign nations, and among the several states * * *.

"4. To establish an uniform rule of naturalization; * * *.

"18. To make all laws which shall be necessary and proper for carrying into execution

the foregoing powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Among the other powers is that vested in the President

"by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur" (*Art. II., sec. 2, subd. 2*).

And these powers are emphasized by *Subdivision 2 of Article VI.*, providing that

"This constitution, and the laws of the United States, which shall be made in pursuance thereof; *and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land*; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Pursuant to said authority Congress has enacted laws which minutely regulate and provide for immigration and naturalization. Respecting naturalization, Congress has provided that an alien must *continuously* reside in this country *at least five years* before he shall become a citizen, and *at least one year* in the district within which he takes out his papers (*R. S., Sec. 4351 et seq.*).

Subject to the requirement of a declaration of intention two years before the issuance of papers, no adult alien of good moral character who can read and write the English language can be prevented by any State from acquiring the same status under the law of the State as that of its proudest citizen whose remote ancestor may have had the

good fortune to have chosen the Mayflower as his vehicle of immigration.

By the exclusive, and during the entire history of our country, unchallenged, mandate of Congress, an alien may become a citizen of the United States, and by local domicile a citizen of any State, by merely declaring his intention after proper residence in this country and by taking an oath of **allegiance**, not to the State of his residence, but to the United States of America.

In passing we note that it may be a matter of inquiry why we have referred to the provision of the Constitution authorizing Congress to regulate commerce. The reason is clear. An examination of the decisions respecting the power to regulate commerce furnishes abundant argument for a similar unrestricted authority in Congress to do all things necessary to make effective its determination with respect to naturalization and domicile of aliens. The authority given to Congress by the Constitution to regulate commerce is given in no broader terms than the authority to provide for naturalization, and this Court has held time and again that the right to regulate commerce is exclusive and all-embracing (*Gibbons vs. Ogden*, 9 Wheat, 1; *Henderson et al. vs. Wickham*, 92 U. S., 259). Under this authority every act of a State Legislature, and even of private corporations and of individuals, designed to result in a regulation of commerce has been promptly nullified by this Court.

If, therefore, Congress has been vested with the power to determine upon what terms an alien may become a citizen, it must also be true that Congress has at its disposal the power to provide for all means necessary to effect its declared purpose.

It follows that if Congress may require continuous residence in this Country, and in a State, before an alien may become naturalized, it must have power to provide for the right of the alien to subsist while the probationary period is elapsing.

During such residence the alien is subject to taxation as is a citizen. All laws of the State and Nation bear upon him equally with citizens. It is only with regard to the power to contract that any question has ever arisen.

Congress therefore enacted a law which insured that right (*Sec. 1977 of the Revised Statutes*):

*"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."*

Means of enforcing these rights are granted by Section 1979. This law obviously does not give to citizens of the United States alone the right to "make and enforce contracts" because the right thereby given is the right which any white "citizen" enjoys in the respective States. This right is expressly given not to citizens, but to "all persons within the jurisdiction of the United States."

That the origin of this law is to be found in a statute passed after the enactment of the Twelfth Amendment to aid in its enforcement, and that it was originally intended to protect colored citizens in their newly acquired rights (*U. S. vs. Rhodes*, 1 Abb. (U. S.), 28, 27 Fed. Cases, p. 785; *Livestock Dealers, etc., Assn. vs. Crescent City Livestock Land-*

ing, etc., Co., 1 Abb. (U. S.), 388, 15 Fed. Cases, p. 649; *Slaughter House Cases*, 16 Wall., 36; *Civil Rights Cases*, 109 U. S., 3; *U. S. vs. Jackson*, 3 Sawy. (U. S.), 59, 26 Fed. Cases, p. 563), does not militate against the inclusiveness of the protection guaranteed thereby. The so-called Civil Rights Act was *re-enacted* after the adoption of the Fourteenth Amendment, which also was primarily designed to protect colored citizens in their political rights, and which has, nevertheless, been held to embrace all rights of all classes and conditions of people.

The right to enact this law follows as naturally and necessarily from the right of Congress to declare the terms upon which an alien may enter and live in the United States and become a citizen of the United States as it does from the right of Congress to enforce the 12th, 13th or the 14th Amendment. To declare that an alien must live within the Nation for five years and within a State for one year before becoming a citizen, and then to be unable to insure him the ability to earn his living and to subsist during that period, is so illogical as to carry its own refutation. In *Lem Moon Sing vs. U. S.*, 158 U. S., 538, this Court, in discussing the subject, said:

"The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country * * * is settled by our previous adjudications * * *. His "(the alien's)" personal rights when he is in this country and such of his property as is here during his absence, are as fully protected by the supreme law of the land as if he were a native or a naturalized citizen of the United States * * *."

In *Yick Wo vs. Hopkins*, 118 U. S., 356, this Court recognized the force and effect of Section 1977:

“The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: ‘Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.’ These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of *equal laws*. It is accordingly enacted by Section 1977 of the Revised Statutes, that ‘all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses and exactions of every kind, and to no other.’ The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.”

Thus did this Court hold that the Fourteenth Amendment applied to aliens equally with citizens, extending its benign protection to all alike whether citizens or aliens.

Freund on Police Powers, Sections 705-706, says:

705. * * * “The States are bound in their treatment of aliens partly by the inter-

national obligations of the United States, partly by the provisions of the Federal Constitution. A State cannot exclude aliens from its territory for political or economical reasons, * * *. Nor is it, generally speaking, competent for the States to deprive resident aliens of any privileges accorded to foreigners by the comity of nations or to discriminate against them where equal treatment is guaranteed by treaty." (Citing *Yick Wo vs. Hopkins*, 118 U. S. 356, *Re Lee Sing*, 43 Fed. Rep. 359.)

706. * * * "it is also clear that the right to take up any other common occupation cannot be barred by the States to resident aliens. For otherwise a State might close all profitable avocations to them, and, by preventing them from earning a livelihood, drive them away. Such a result would bring about international complications and can therefore be only a matter of national action. The federal adjudications in the matter of discrimination against Chinese in the laundry business, while involving also treaty rights, seems to support this position." (Citing *Yick Wo vs. Hopkins*, 118 U. S. 356, *Re Parrott*, 1 Fed. Rep. 481.)

The *Yick Wo* case has been cited no less than sixty times in the United States courts. We can find space for the briefest reference to only a few of these citations.

In *Connolly vs. Union Sewer Pipe Co.*, 184 U. S., 539, the court held that in a trust law a discrimination in favor of agricultural products or live stock rendered the act repugnant to the fourteenth amendment. In this case Mr. Justice Harlan in delivering the opinion, refuted the assertion that the act might be justified under the Police Powers, saying:

"But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. * * * The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

Wong Wing vs. U. S., 163 U. S., 228,

holding that the protection of the fifth and sixth amendments applied to alien residents and prohibited commitment to hard labor without presentment or indictment and conviction.

Ex parte Orozco, 201 Fed. Rep., 106,

holding that the fourth, fifth and sixth amendments "protected citizens and aliens alike."

Other cases holding that the right to labor and pursue any lawful vocation is not only property but the right to liberty covered by the fourteenth amendment; that the power of the state to legislate falls before the exercise of powers conferred upon the United States Government whether resting in Congress or the treaty making powers, are numerous:

Sinnot vs. Davenport, 63 U. S. (22 How.), 227,

where the court held that the exercise of the police power is thereby nullified.

In re Baldwin, 27 Fed. Rep., 187,

interpreting a statute of the United States punishing a conspiracy to deprive Chinese of privileges secured to them by treaties.

Mondou vs. N. Y., N. H. & H. R. R. Co., 223 U. S., 1,

holding that the United States law is supreme in state court—constitutes the state policy, see page 58.

McCulloch vs. Maryland, 17 U. S. (4 Wheaton), 316, at p. 405.

Gandolfo vs. Hartman, 49 Fed. Rep., 181,

holding void a covenant in a deed not to convey or lease to a Chinaman.

Workman vs. Mayor, 179 U. S. 552,

reversing the decisions of the Court of Appeals of New York State that a municipality is exercising a governmental capacity in its fire department and is not liable for torts committed in pursuit of such function, and holding that at maritime law a municipality is liable for such a tort.

People vs. King, 110 N. Y., 418,

holding that the refusal to sell tickets to a negro for entrance to a skating rink was a deprivation of liberty.

People ex rel. Tyroler vs. Warden, 157 N. Y., 116,

holding unconstitutional an act limiting sale of passenger tickets.

In re Jacobs, 98 N. Y., 98,

holding unconstitutional an act prohibiting manufacture of cigars and preparation of tobacco in a tenement.

Butchers Union Co. vs. Crescent City etc. Co., 111 U. S., 746

People vs. Hawkins, 157 N. Y., 1,

condemning a law requiring all convict goods to be so labelled.

People vs. Marx, 99 N. Y., 377,

condemning a law prohibiting the manufacture or sale of a substitute for butter or cheese.

Frerer vs. The People, 141 Ill., 171,

"the privilege of contracting parties is both a liberty and a property right."

McChesney vs. The People, 200 Ill.,
146.

And

City of Chicago vs. Hulbert, 205 Ill.,
346,

holding agreement in municipal contracts not to employ aliens is unconstitutional and void. These cases seem to in effect overrule the earlier case of *People vs. Nelson*, 133 Ill., 565.

It is apparent that the above reasoning is not in any way modified by the decision of this Court in *Atkin vs. Kansas*, and *Ellis vs. U. S.* (supra). In those cases this Court ruled that the State may establish restrictions in its contracts *which apply to all alike*, may require its contractors to pay to its employees, *whomever they be*, the rate of wages prevailing in the community, and may enjoin its contractors, under penalty of forfeiture and punishment as for a crime, from requiring or permitting their employees to work more than eight hours in any day. Such regulations apply to *citizen and alien contractors alike, to citizen and alien employees alike*, and are not therefore a violation either of the Fourteenth Amendment, or of Section 1977 of the Revised Statutes.

But where, as illustrated by Section 14 of the Labor Law of the State of New York, an arbitrary

line is drawn between the right of citizens and aliens to "make and enforce contracts" both the Fourteenth Amendment and Section 1977 are violated, and the law is void.

We submit that if aliens were accorded no other protection than as above set forth the statute in question must be declared null and void and the conviction of plaintiff in error must be reversed.

(c) SECTION 14 OF THE LABOR LAW ALSO VIOLATES TREATIES DULY ENTERED INTO BY THE UNITED STATES GOVERNMENT WITH FOREIGN NATIONS, AND SECTION 1977 OF THE REVISED STATUTES.

But other and equally potent rights of aliens have been violated by said acts—rights granted by the Executive and Senate by treaty.

That the treaty making power is as absolute and inclusive as other powers granted by the Constitution to the general government, is established equally by reason and authority.

What we have said with respect to the necessity of authority in Congress to protect resident aliens before they may become citizens applies with equal force to the necessity that the treaty making power of our government shall have the unlimited and conclusive right to stipulate with foreign governments the kind and extent of the rights which its, and their, citizens shall exercise in the territory of the other.

And such reasoning has been repeatedly and cogently applied by this Court since the foundation of our government in cases where the extent of that power has been questioned. The text book

writers treat it as an established rule of law. In 38 *Cyc.*, p. 966, we find the following

“As expressed in the Constitution of the United States, the treaty making power is in terms unlimited, and subject only to these restraints which are found in that instrument against the action of the government or its departments and those arising from the nature of the government itself and of that of the States” (citing *De Geofroy vs. Riggs*, 133 U. S., 258).

In *Penhallow vs. Doane's Adms.*, 3 *Dallas*, 54, the Court said that Congress was the central authority during the Revolution:

“The truth is, that the States individually were not known nor recognized as sovereign by foreign nations, nor are they now” (1795); “the states collectively under Congress as the connecting point or head, were acknowledged by foreign powers as sovereign, particularly in that acceptance of the term which is applicable to all great national concerns, and in the exercise of which other sovereigns would be more immediately interested; such, for instance, as the right of war and peace, of making treaties, and sending and receiving ambassadors.”

* * * * *

After adverting to the fact that the people may act by representatives and the majority may bind all, the court illustrated the central power of Congress, saying (page 94):

“These principles have long been familiar in regard to the exercise of a constitutional power as to treaties. These are deemed the treaties of the two nations, not of the persons

only, whose authority was actually employed in their formation."

In *Choe Chan Ping vs. U. S.*, 130 U. S., 581, the Court said:

"As said by this court in the case of *The Exchange vs. McFadden*, 11 U. S. (7 Cranch), 116, 136, speaking by Chief Justice Marshall:

" 'The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restrictions, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source.'

"While under our Constitution and form of government, the great mass of local matters is controlled by local authorities, the United States in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties, * * *, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control more or less, the conduct of all civilized nations."

The Court then quoted from the decision of Chief Justice Marshall in *Cohens vs. Virginia* (*supra*).

This doctrine was emphasized in *Edye vs. Robertson*, 112 U. S., 580:

"A treaty is primarily a compact between independent nations. * * * But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. * * * A treaty then, is a law of the land as an Act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a Court of Justice, that Court resorts to the treaty for a rule of decision for the case before it, as it would to a statute."

In the argument of *Patsonc vs. Pennsylvania* (*supra*), the Attorney-General of the State asserted that the treaty making powers of the Federal Government is not unlimited, citing as authority *De Geofroy vs. Riggs*, 133 U. S., 258. We submit that nothing in the text of the decision of that case warrants such conclusion:

"It is a rule in construing treaties as well as laws, to give a sensible meaning to all their provisions if that be practicable. 'The interpretation, therefore,' says Vattel, 'which would render a treaty null and inefficient can not be admitted;' and again 'it ought to be interpreted in such a manner as that it may have its effect, and not prove vain and nugatory.'"

* * * * *

“By the last clause of the article the government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property and to inheritance as are enjoyed there by its own citizens. There is no limitation as to the territory of France in which the right of inheritance is conceded. And it declares that this right is given in like manner as the right is given by the government of the United States to citizens of France. To insure reciprocity in the terms of the Treaty, it would be necessary to hold that by ‘States of the Union’ is meant all the political communities exercising legislative powers in the country, embracing not only those political communities which constitute the United States, but also those communities which constitute the political bodies known as Territories and the District of Columbia. It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *Hauenstein vs. Lynham*, 100 U. S., 487 (25; 629). The stipulation that the government of France in like manner accords to the citizens of the United States the same

rights within its territory in respect to real and personal property in inheritance as are enjoyed there by its own citizens, indicates that that government considered that similar rights were extended to its citizens within the territory of the United States, whatever the designation given to their different political communities."

In *Hauenstein vs. Lynham*, 100 U. S. 487 referred to in the above decision this court was even more emphatic, saying:

"The efficacy of the treaty is declared and guaranteed by the Constitution of the United States. That instrument took effect on the 4th day of March, 1789. In 1796, but a few years later, this court said: 'If doubts could exist before the adoption of the present National Government they must be entirely removed by the 6th article of the Constitution, which provides that "all treaties made or which shall be made under the authority of the United States shall be *the supreme law of the land*, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." There can be no limitation on the power of the people of the United States. By their authority the State Constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the State Constitutions or to make them yield to the General Government and to treaties made by their authority. A treaty cannot be *the supreme law of the land*, that is, of all the United States, if any Act of a State Legislature can stand in its way. If the Constitution of a State, which is the fundamental law of the

State and paramount to its Legislature, must give way to a treaty and fall before it, can it be questioned whether the less power, an Act of the State Legislature must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual State, and their will alone is to decide. If a law of a State, contrary to a treaty, is not void but voidable only, by a repeal or nullification by a State Legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole." *Ware vs. Hilton*, 3 Dall. 199.

* * * * *

"It must always be borne in mind that the Constitution, laws and treaties of the United States are as much a part of the law of every state as its own local laws and constitution. This is a fundamental principle in our system of complex national polity. * * *"

In re Tiburcio Parrott, 1 Fed. Rep., 481, holding unconstitutional a law of California making it an offense to employ Chinese; also holding a similar provision in the Constitution of California void as in conflict with the Chinese treaty,

the court in two separate opinions exhaustively examined prior state and federal cases, and pointed out the unanimity of decisions that treaties and the rights granted thereunder are paramount to all state constitutions and laws. Judge Sawyer said in part:

"As to the point whether the provision in question is within the treaty-making power, I

have as little doubt as upon the point already discussed. Among all civilized nations, in modern times at least, the treaty-making power has been accustomed to determine the terms and conditions upon which the subjects of the parties to the treaty shall reside in the respective countries, and the treaty-making power is conferred by the constitution in unlimited terms. Besides, the authorities cited on the first point fully cover and determine this question. If the treaty-making power is authorized to determine what foreigners shall be permitted to come into and reside within the country, and who shall be excluded, it must have the power generally to determine and prescribe upon what terms and conditions such as are admitted shall be permitted to remain. If it has authority to stipulate that aliens residing in a state may acquire and hold property, and on their death transmit it to alien heirs who do not reside in the state, against the provisions of the laws of the state, otherwise valid—and so the authorities already cited hold—then it certainly must be competent for the treaty-making power to stipulate that aliens residing in a state in pursuance of the treaty may labor in order that they may live and acquire property that may be so held, enjoyed, and thus transmitted to alien heirs. The former must include the latter—the principal, the incidental power. See also *Holden vs. Joy*, 17 Wall., 242-3; *U. S. vs. Whisky*, 3 Otto, 196-8.”

Judge Sawyer decided that such provisions were also violative of the fourteenth amendment, saying:

“Section 1977 of the Revised Statutes passed to give effect to this amendment, pro-

vides that 'all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.'

"It will be seen that in the latter clause the words are 'any person,' and not 'any citizen,' and prevents any state from depriving 'any person' of life, liberty or property without due process of law or from denying to 'any person' within its jurisdiction the equal protection of the law.' In the particulars covered by these provisions it places the right of every person within the jurisdiction of the state, be he Christian or heathen, civilized or barbarous, Caucasian or Mongolian, upon the same secure footing and under the same protection as are the rights of citizens themselves under other provisions of the constitution; and, in consonance with these provisions, the statute enacts that 'all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.' Chinese residing in California, in pursuance of the treaty stipulations, are 'persons within the jurisdiction of the state,' and 'of the United States,' and therefore within the protection of these provisions. And contracts to labor, such as all others make, are contracts which they have a 'right

to make and enforce,' and the laws under which others' rights are protected are the laws to which they are entitled to the 'equal benefit,' as is enjoyed by white citizens."

"It would seem that no argument should be required to show that the Chinese do not enjoy the equal benefit of the laws with citizens, or 'the equal protection of the laws,' where the laws forbid their laboring or making and enforcing contracts to labor, in a very large field of labor which is open, without limit, let or hindrance, to all citizens, and all other foreigners, without regard to nation, race, or color. Yet in the face of these plain provisions of the national constitution and statutes, we find, both in the constitution and laws of a great state and member of this Union, just such prohibitory provisions and enactments discriminating against the Chinese. Argument and authority, therefore, seem still to be necessary, and fortunately we are not without either. From the citations already made, and from many more that might be made from Justices Field, Bradley, Swayne and other judges, it appears that to deprive a man of the right to select and follow any lawful occupation—that is, to labor, or contract to labor, if he so desires and can find employment—is to deprive him of both liberty and property, within the meaning of the fourteenth amendment and the act of congress."

Among the many cases cited in the Parrott case or cited in cases so cited are the following:

U. S. vs. Rauscher, 119 U. S., 407,

dealing with the power of extradition and holding it to be exclusively within federal, and not state,

jurisdiction, as exercised by the treaty making power.

Baker vs. Portland, 2 Fed. Cases, 472

Holding law prohibiting the employment of Chinese to be invalid as conflicting with the treaty with China, saying:

"This treaty, until it is abrogated or modified by the political department of the government, is the supreme law of the land, and the courts are bound to enforce it fully and fairly. An honorable man keeps his word under all circumstances, and an honorable nation abides by its treaty obligations, even to its own disadvantage.

"The state cannot legislate so as to interfere with the operation of this treaty or limit or deny the privileges or immunities guaranteed by it to the Chinese residents in this country. As was said by Mr. Justice Field in the 'queue ordinance case,' lately decided in the circuit court for the district of California (*Ho Ah Kow vs. Nunan*, Case No. 6546) to the national government, 'belong exclusively the treaty-making power and the power to regulate commerce with foreign nations, which includes intercourse as well as traffic. * * * That government alone can determine what aliens shall be permitted to land within the United States and upon what conditions they shall be permitted to remain.'

"It will be observed that the treaty recognizes the right of the Chinese to change their home and allegiance and to visit this country and become permanent residents thereof, and as such residents it guarantees to them all the privileges and immunities that may be enjoyed here by the citizens or subjects of any nation.

Therefore, if the state can restrain and limit the Chinese in their labor and pursuits within its limits, it may do the same by the subjects of Great Britain, France, or Germany.

“True, this act does not undertake to exclude the Chinese from all kinds and fields of employment. But if the state, notwithstanding the treaty, may prevent the Chinese or the subjects of Great Britain from working upon street improvements and public works, it is not apparent why it may not prevent them from engaging in any kind of employment or working at any kind of labor.

“Nor can it be said with any show of reason or fairness that the treaty does not contemplate that the Chinese shall have the right to labor while in the United States. It impliedly recognizes their right to make this country their home, and expressly permits them to become permanent residents here; and this necessarily implies the right to live and to labor for a living. It is difficult to conceive a grosser case of keeping the word of promise to the ear and breaking it to the hope than to invite Chinese to become permanent residents of this country upon a direct pledge that they shall enjoy all the privileges here of the most favored nation, and then to deliberately prevent them from earning a living, and thus make the proffered right of residence a mere mockery and deceit. In *Chapman vs. Toy Long* (Case No. 2610), this court, in considering these provisions of this treaty, said: ‘The right to reside in the country, with the same privileges as the subjects of Great Britain or France, implies the right to follow any lawful calling or pursuit which is open to the subjects of these powers.’

"Whether it is best that the Chinese or other peoples should be allowed to come to this country without limit and engage in its industrial pursuits without restraint is a serious question, but one which belongs solely to the national government. Upon it there has always been a difference of opinion, and probably will be for years to come.

"But so far as this court and the case before it is concerned, the treaty furnishes the law, and with that treaty no state or municipal corporation thereof can interfere. Admit the wedge of state interference ever so little, and there is nothing to prevent its being driven home and destroying the treaty and overriding the treaty-making power altogether."

By the foregoing cases, and many others which might be cited, it is firmly established that if rights are granted to aliens by treaties they cannot be destroyed or limited by any act of a state; and that among such rights are the right to labor at any chosen lawful occupation upon equal terms with citizens.

The treaties of the Government of the United States with foreign governments and their stipulations being supreme over, and binding upon, the States and their Legislatures if in conflict with any State legislation, it remains only to examine the several treaties mentioned in the record and to determine the force and effect of their stipulations upon Section 14 of the Labor Law of the State of New York.

It should be noted that one of the aliens employed by plaintiff in error was a subject of Italy (page 12) and that of the other two, one (Frank Lamano) bore an Italian name, and the other (Alexander Treets) may have been a subject of any

one of two or three nations, if we resort to philology for a basis of a guess. Portions of various treaties with various countries deemed pertinent are contained in the record (pp. 13-27) and reference is made thereto. In the following quotations we shall, for the sake of brevity, skeletonize the excerpts.

The Treaty with Italy of 1871 was amended in 1913, and Article 1 of the latter treaty provides:

"The citizens of each * * * shall receive * * * the most constant security and protection for their *persons* and *property*, and for their rights, including * * * civil responsibility for injuries or for death caused by negligence * * *; and shall enjoy in this respect the same *rights* and *privileges* as are * * * granted to nationals, provided that they submit themselves to the conditions imposed on the latter."

By Article 2 the "citizens" of each are authorized to

"*carry on trade* * * * and generally to do anything incident to or necessary for *trade* upon the same terms as the *natives of the country* submitting themselves to the laws there established."

Because we know that one of the aliens employed by plaintiff in error was an Italian subject, let us first consider whether the treaty with Italy gave him equality with citizens in the right to employment upon the public works of the State of New York.

It is perhaps unnecessary to repeat that we do not assert that the alien has a greater right than citizens. Our contention is solely that if citizens are by the State given the right to labor upon pub-

lic works, that right is by the treaty given also to the alien.

Let us for a moment revert to the provisions of the Chinese treaty which this Court in *Yick Wo vs. Hopkins* (supra) said gave to Chinese laborers equal rights with citizens. That treaty provided only that

"if Chinese laborers * * * residing in the * * * United States, meet with ill treatment * * * the Government of the United States will * * * secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty."

The treaty contains nothing respecting "liberty" or "property" or the "right to contract," but, nevertheless, this court, aided by Section 1977 of the Revised Statutes, held that the phraseology of the treaty settled the mantle of protection provided by the Fourteenth Amendment over the Chinese laborers, saying:

"The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court."

This conclusion followed the premises theretofore stated by the court, that:

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens."

In one of its most recent utterances (*Coppage vs. Kansas*, 236 U. S., 240) this court defined (not

for the first time) what "liberty" and "property" meant when read in the Fourteenth Amendment:

"* * * Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other form of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money."

In *Lochner vs. New York*, 198 U. S., 45, this Court said:

"The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution * * *. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. * * *."

In *Smith vs. Texas*, 233 U. S., 630, it was said:

"In so far as a man is deprived of the right to labor, his liberty is restricted. * * *."

In *Southern R. R. Co. vs. Green*, 216 U. S., 400, we find this phraseology:

"The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a

person within the jurisdiction of the State of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same right as belong to, and bear the same burdens as are imposed upon, other persons in a like situation."

In *Allgeyer vs. State of Louisiana*, 165 U. S., 570, "liberty" is again discussed:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

The Court cited Justice Bradley in *Butcher's Union, etc., Co. vs. Crescent City, etc., Co.*, 111 U. S., 746:

"I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States,"

and continued:

"But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and give to others the exclusive right of pursuing it, it certainly does deprive

him to a certain extent of his liberty, for it takes from him the freedom of adopting and following the pursuit which he prefers; which as already intimated is a material part of the liberty of the citizen."

With these definitions in mind, it is impossible to escape the logic of the conclusion that when by treaty subjects of Italy are given the right to

*"trade * * * upon the same terms as the natives of the country"*

and are accorded

*"protection for their * * * property and for their rights"*

with the privilege to

"enjoy in this respect the same rights and privileges as are or shall be granted to nationals,"

the State cannot by law withdraw from them the right and privilege to labor upon public works. And this is especially so when we remember that the treaty provision is enforced and illuminated by the mandate of Section 1977 of the Revised Statutes that

*"all persons within the jurisdiction of the United States shall have the same right in every State * * * to make and enforce contracts * * * as is enjoyed by white citizens."*

If, therefore, the State of New York cannot directly prohibit a subject of Italy from laboring upon public works, it cannot do it by indirection by prohibiting its contractors from employing him upon such public works. (*Coppage vs. Kansas, supra.*)

If the conviction of plaintiff in error could not be founded upon the employment of an Italian citizen, it could not be based upon the employment of two other aliens of unproved nationality, for if they were Italian subjects they were protected by treaty, and if they were not we have cited treaties with many other nations granting rights in language even more explicit.

We shall refer to them very briefly.

The treaties with the Argentine Republic, Costa Rica, Japan, Liberia and Paraguay grant protection to "persons and property" In addition the Japanese treaty authorizes the citizens of each country to

"carry on trade * * * and generally do anything incident to or necessary for trade upon the same terms as native citizens."

Liberian citizens are also given the right to "reside in and trade to any part of" the United States, and are also granted

"all other rights and privileges which are or may be granted to any other foreigners, subjects or citizens of the most favored nation."

Paraguayans are also given full liberty to sell to whom they like all articles of lawful commerce.

The treaty with Austria-Hungary gives the right to "sojourn and reside" in the United States "to attend to their commercial affairs."

By the Belgian treaty

"the privileges, immunities, and other favors, with regard to commerce or *industry*"

(which)

"shall be enjoyed by the citizens or subjects of one of the two states *shall be common to those of the other.*"

By the Bolivian treaty in addition to the right to "trade," the citizens or subjects of the contracting parties are given the right

"in all cases" (to) "enjoy the same security and protection as the natives of the country in which they reside."

The subjects of Borneo are given

"all the privileges and advantages, with respect to commerce *or otherwise*, which are now or which may hereafter be granted * * * to the citizens or subjects of the most favored nation."

By the treaties with Chile, Colombia, Denmark, Ecuador, Peru, and Persia, their citizens are given equal privileges of navigation and commerce with citizens of the United States either by express stipulation or by reason of the most favored nation clause. Colombians, Ecuadorians and Peruvians are also given equal "trade" privileges.

The treaty with Paraguay stipulates that the citizens of each country shall have full liberty "to manage their own affairs" * * * and "shall enjoy full * * * protection for their persons and property" and shall enjoy "in this respect, the same rights and privileges as native citizens."

Salvadorians are permitted to engage

"in all kinds of trade * * * upon the same terms with the native citizens,"

and they

"shall enjoy all the privileges and concessions in these matters which are or may be made to the citizens of any country."

Servians are authorized by treaty to "carry on their business" and it is stipulated that they

"shall enjoy in this respect for their persons and property the same protection as that enjoyed by natives or by the subjects of the most favored nation."

The treaty also provides that as to "all other matters connected with trade" the citizens of each shall

"enjoy the treatment of the most favored nation, and all the rights, *privileges*, exemptions and *immunities* of any kind enjoyed with respect to commerce and *industry* by the citizens or subjects of the high contracting parties, or which are or may be hereafter conceded to the subjects of any third party."

The Spanish treaty provides that the citizens of each shall

"enter, travel and reside in all parts of their respective territories * * * and they shall enjoy in this respect for the protection of their persons and property the same treatment and the same *rights* as the citizens or subjects of the country or * * * of the most favored nation."

They are also authorized to

"freely exercise their *industry* or their business, without being subjected as to their persons or property to any taxes, general or local, imposts or *conditions whatsoever*, other or more onerous than those which are imposed or may be imposed upon the citizens or subjects of the country or * * * of the most favored nation."

In this treaty laws respecting taxation, commerce, health, police and public security which may be applied to foreigners in general are excepted from the treaty rights secured.

The treaty with Switzerland provides:

“The citizens * * * shall be admitted and treated upon a footing of reciprocal equality * * * where such admission and treatment shall not conflict with the Constitution or legal provisions as well Federal and State as Cantonal of the contracting party. The citizens * * * subject to the constitutional and legal provisions aforesaid * * * shall be at liberty * * * to exercise their profession, their industry and their commerce * * *. No pecuniary *or other more burdensome condition* shall be imposed * * * upon the enjoyment of the above-mentioned rights than shall be imposed upon citizens of the country where they reside, *nor any condition whatever to which the latter shall not be subject.*”

The foregoing summaries show that with at least 20 countries (including Italy) treaties exist which in general or particular phraseology grant rights to resident aliens to labor and make contracts upon equality with citizens.

Section 14 of the Labor Law of the State of New York is unquestionably void as to the subjects of these nations. Inasmuch, therefore, as the State failed in its clear legal duty *in the prosecution of a criminal case* to prove that the aliens Lamano and Treet were not subjects of one or the other of the nations with which the above-mentioned treaties exist, the conviction could not be based upon their employment by plaintiff in error.

But the fact that Section 14 of the Labor Law is repugnant to, and void, as against the provisions of so many treaties, is of even greater importance in considering its validity.

This law is a penal statute and must be construed as such. As it is void as to some—indeed many—resident aliens, under well established rules of construction the courts will not discriminate and determine in individual cases when it is valid and when invalid. It is incumbent upon the Legislature of the State of New York to frame a statute affecting such aliens as are not protected by treaty—if indeed in the face of the provisions of Section 1977 of the Revised Statutes, and of the Fourteenth Amendment, any such law could be valid as to any resident alien.

If void as against any treaty—or as against all treaties herein discussed, it is void as to all resident aliens, whether protected by treaty or not.

Wynehamer *vs.* People, 13 N. Y., 378;
Sutherland *on* Statutory Construction, sec. 172-173;
United States *vs.* Reese, 92 U. S., 214;
United States *vs.* Harris, 106 U. S., 629;
Trade Mark Cases, 100 U. S., 82.
Virginia Coupon Cases, 114 U. S., 270.
Baldwin *vs.* Franks, 120 U. S., 679.
Rathbone *vs.* Wirth, 150 N. Y., 459.
Lawton *vs.* Steele, 119 N. Y., 226.

In Wynehamer *vs.* People (*supra*) the Court of Appeals clearly stated this rule (opinion of Selden, J., page 441) :

“Thus the courts would be required over and over again to declare the same legislative provisions both valid and void, as applicable

to different classes of cases. This has been in some instances, but with doubtful propriety, tolerated in purely civil cases; but never, I believe, in respect to penal and criminal legislation." * * *

See also *ibid* (opinion of Johnson, J., page 425).

POINT II.

The contract agreement to comply with the law falls with the law itself.

In the contract under consideration, there is no written contract covenant to comply with section 14 of the Labor Law, but such covenant is imported into the contract by virtue of the law, if the law is valid. Conversely, if the law is invalid, its provisions do not form a part of defendant's contract with The City of New York.

It may be that the above proposition needs no argument, but inasmuch as most contracts with municipalities are written, and, pursuant to the mandate of the law, contain an express covenant to employ only citizens on the work thereunder, the question should be decided whether such covenants have any force if the law itself be unconstitutional.

The Court of Appeals of the State of New York has decided that such covenants have no force, after the law which requires them has been declared unconstitutional.

It is true that in *People vs. Orange County Road Construction Company*, 175 N. Y., 84, Judge Cullen uttered a dictum that, if the municipality and the contractor should enter into a contract agreement to comply with the Labor Law, such agreement

would be binding on both parties, regardless of the law, just as any contract covenant would be binding upon the parties thereto.

And in *People ex rel. Cossey vs. Grout*, 179 N. Y., 417, Judge Cullen elaborated his argument, citing the suppositious absurdity of an agreement that employees should wear black hats and black shoes, and arguing that such covenant would be binding.

We may assent to his argument, if we assume that both parties voluntarily, and for any supposed beneficial reason, purposely inserted such a covenant. But a very different rule applies both in the courts of New York State and in the United States Supreme Court, where a covenant has been inserted into a contract by force of an invalid law and without desire or intent other than to abide by the law.

As we have seen, the remark of Judge Cullen in the Orange County Road Company case was a dictum, and his opinion in the Cossey case was not the prevailing opinion on that point. In other cases, the Court of Appeals has squarely met the issue and decided that such a covenant falls with the law itself.

People ex rel. Rodgers vs. Coler, 166 N. Y., 1 (at pp. 9, 21).

Knowles vs. City, 176 N. Y., 430 (at pp. 438-41).

People ex rel. Cossey vs. Grout, 179 N. Y., 417 (opinion of O'Brien).

This is also the rule in the United States Supreme Court.

Home Ins. Co. vs. Morse, 87 U. S. (20 Wallace), 445, at pp. 458-9 (frequently cited with approval).

POINT III.

The fact that the Legislature of the State of New York after the conviction of plaintiff in error amended section 14 of the Labor Law, does not militate against the rights of the plaintiff in error in this Court.

In the Legislative Session of this year, the Legislature of the State of New York (March 11, 1915), after the affirmance by the Court of Appeals of the conviction of plaintiff in error, and the allowance of the writ herein on March 4, 1915, being equally with the contractors and the City of New York alarmed at the re-vivifying of a law which had for fifteen years been deemed unconstitutional and held a dead letter, and realizing the impossibility of complying with its provisions because a sufficient number of the citizens could not be procured to do the pick and shovel work of the "short-backed Italian laborers," amended said section. (Ch. 51, Laws of 1915.) The amendment will be found in the first six lines as follows:

"Preference in employment of persons upon public works. In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, preference shall be given to citizens over aliens. Aliens may be employed when citizens are not available."

Plaintiff in error, while his conviction made the foregoing action necessary, was convicted under the former statute, and seeks a review in this court of his conviction under the law in its original form.

It is apparent, therefore, that a decisive determination of the questions involved in this appeal is necessary, not only to remove the stigma from plaintiff in error, but also because the law in its amended form is equally invalid for the reasons stated at such length in this brief.

POINT IV.

The conviction of plaintiff in error should be reversed and the case remanded to the Court of Special Sessions of The City of New York for appropriate action.

It is conceded (opinion of Cardozo, page 51, opinion of Seabury, page 61) that the State of New York cannot lawfully forbid the employment of aliens by private citizens—the employment of aliens generally—upon such private work as digging for a sewer, or, as in the instance presented in the companion case of *Heim vs. McCall*, upon such work as digging for and constructing a subway railroad, or upon such other work, similar in nature to other public works, as the construction of the new Erie Canal, the construction of buildings, streets, etc. Such prohibition would offend the constitution, the treaties and the statutes of the United States beyond peradventure or cavil. And the sole question here presented is whether the State of New York can lawfully do this very thing as to the digging, the bricklaying, the concreting, etc., on state and municipal work, without *pro tanto* offending the supreme law.

If the argument of the Court of Appeals be sustained, would not the State of New York, under its

regulative powers over corporations created by it, likewise, and by a parity of reasoning, be able lawfully to prohibit such corporations from employing aliens? It would seem so. And then the alien, invited to our shores, and awaiting his citizenship, could live only by employment by private natural persons. Constitutional, treaty and statutory protection to him would thus be reduced almost to farcical proportions.

No question of the public health, morals or good order can be raised to aid the defense of this law, arbitrarily designed

“to deprive employers of a part of their liberty of contract to the * * * upbuilding of the labor organizations” (*Coppage vs. Kansas, supra*).

It is as void as it is offensive, and the march of events has shown that it was not intended to be enforced, but was designed as a club to be wielded by labor organizations for the control of contracting employers. As soon as it was declared valid it was found to be unworkable, and a substitute therefor was enacted which is equally menacing, and even more unworkable.

The original and amended law are both void and should be so declared.

All of which is respectfully submitted.

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Supreme Court of the United States,

OCTOBER TERM, 1915.

CLARENCE A. CRANE,
Plaintiff-in-Error,

against

No. 388.

THE PEOPLE OF THE STATE OF
NEW YORK,
Defendant-in-Error.

Brief for Defendant-in-Error.

THIS CASE INVOLVES THE CONSTITUTIONALITY OF THE PROVISION OF THE NEW YORK LABOR LAW PROHIBITING THE EMPLOYMENT OF ALIENS IN THE "CONSTRUCTION OF PUBLIC WORKS".

It comes before this Court on a WRIT OF ERROR directed to the Court of Special Sessions of the City of New York, in the State of New York, to review a judgment by which the plaintiff-in-error, the defendant below, and hereinafter so referred to, was sentenced to pay a fine of \$50., rendered upon a conviction of a misdemeanor—employing aliens contrary to the direction of the statute.

The original judgment of conviction was rendered in the Court of Special Sessions on Decem-

ber 9th, 1914. An appeal was taken therefrom by the defendant to the Appellate Division of the Supreme Court of New York, and the judgment of conviction was there reversed on December 31st, 1914 [165 App. Div., 449]. An appeal was thereupon taken by the People of the State of New York to the Court of Appeals of the State, and the judgment of the Appellate Division (which had reversed the original judgment of conviction) was there reversed, and the judgment of conviction affirmed [214 N. Y., 154] (Record pp. 1-2).

Upon the affirmance of the judgment of conviction by the Court of Appeals, that Court, in accordance with the practice and procedure of the State of New York (Code Crim. Pro., §§548, 549), remitted the record and proceedings to the Court of Special Sessions of the City of New York, in which court the original judgment had been rendered; and an order was there entered, upon the *remittitur*, making the judgment of the Court of Appeals the judgment of the Special Sessions, and directing that the original judgment of conviction be enforced and carried into execution and effect (Record pp. 71-72).

Thereafter, on March 4th, 1915, MR. JUSTICE HUGHES allowed the writ of error upon which the cause now comes before this Court; and this writ—as would seem to be in accordance with the proper procedure—is “addressed to the trial court because of the action of the Court of Appeals in remitting the entire record to that court” (*Carlesi v. New York*, 233 U. S., 51, 56; *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 200). The basis for the writ of error is the adverse rulings

of the Court of Appeals concerning the asserted Federal rights.

Upon his trial, and in the appellate courts, the defendant drew in question the validity of the statute under which he was convicted, on the ground of its repugnance to the CONSTITUTION and TREATIES of the United States (Record, p. 12-13; 34 *et seq.*). The decision of the highest court of the State of New York was in favor of its validity; and the case is now brought to this Court under the authority of §237 of the Judiciary Code of the United States.

The Facts.

It is unnecessary to enter into any detailed statement of the facts. The charge against the defendant is clearly set forth in the Information, and the evidence received on the trial, which is undisputed, supports the allegations.

The defendant contracted with the Municipality of the City of New York, acting through the medium of its public officials, to construct for said city certain catch or *sewer* basins—a part of the public sewerage system of the city. This was a “*public work*” of the municipality (Record, p. 9).

In the construction of this work by the defendant—who was a person contracting with the municipality for its construction—he employed a person who was not a citizen of the United States, *viz*: one Passanetti. This Passanetti was a subject of the King of Italy (Record, pp. 11-12).

It is undisputed that the defendant Crane was performing the work *under a contract* with the

City, and that he did employ this alien as one of his workmen on this particular job.

The New York Statute.

The statute under which the defendant was prosecuted and convicted is LABOR LAW, §14 (N. Y. Cons. Laws, Chap. 31, [L. 1909, Chap. 36], §14). It reads as follows:

§14. **Preference in employment of persons upon public works.** In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the State of New York. In each contract for the construction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void. All boards, officers, agents or employees of cities of the first class of the state, having the power to enter into contracts which provide for the expenditure of public money on public works, shall file in the office of the commissioner of labor the names and addresses of all contractors holding contracts with said cities of the state. Upon the letting of new contracts the names and addresses of such new contractors shall likewise be filed. Upon the demand of the commissioner of labor a contractor shall furnish a list of the names and addresses of all subcontractors in his employ. Each contractor performing work for any city of the first class shall keep a list of his employees, in which it shall be set forth whether they are naturalized or native born citizens of the United States, together with, in case of naturalization, the date of naturali-

zation and the name of the court where such naturalization was granted. Such lists and records shall be open to the inspection of the commissioner of labor. A violation of this section shall constitute a misdemeanor and shall be punishable by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment for not less than thirty nor more than ninety days, or by both such fine and imprisonment.

Labor Law, § 14.

The particular portion of the statute which has relation to the present case is as follows:

"In the **construction of public works** by the State or a municipality, or by persons contracting with the State or such municipality, only citizens of the United States shall be employed.

* * * * *

A violation of this section shall constitute a misdemeanor. * * *"

The "alien" provision was first enacted in New York by L. 1894, CHAP. 622. A preferential provision had been previously enacted by L. 1889, CHAP. 380. These two last mentioned statutes were repealed by L. 1897, CHAP. 415. This L. 1897, CHAP. 415, was a general law known as the "LABOR LAW" and was practically a codification and revision of a number of labor statutes. The "alien" provision was re-enacted therein as §13. The particular provision of the present law with which we are here concerned is identically the same as that contained in L. 1897, CHAP. 415, §13. It occupies its present position in the statutes of New York by virtue of the consolidation of the general laws, which was concluded in 1909. And

by virtue of the provisions of the N. Y. Gen. Construction Law (Cons. Laws, Chap. 22 [L. 1909, Chap. 27]), §95, it is to be deemed a continuation of the similar provision of the prior law, and not as a new enactment (*vid.* *People v. Dwyer*, 215 N. Y., 46, 50). It may, therefore, be said to have been in existence since the year 1894.

The Plaintiff-in-Error's Contentions.

The plaintiff-in-error contends that the statute:

1. Deprives persons—the contractors and the aliens—of liberty and property without due process of law, and that, hence, it is in violation of the Fifth Amendment of the Federal Constitution.

2. Deprives persons—the contractors and the aliens—of liberty and property without due process of law, and denies them the equal protection of the laws, and hence, is in violation of the Fourteenth Amendment of the Federal Constitution.

3. Applies to contracts in existence at the time of its enactment and is void as an *ex post facto* law—U. S. Const., Art. I, §10.‡

4. In so far as the present case is concerned, is inoperative and of no binding force or effect because in contravention of the treaty between the United States and Italy, entered into by the Federal Government under the general treaty-making power vested in such government by the Federal Constitution—U. S. Const., Art. II, §2; *Id.* Art. VI, §2.

‡In the assignment of errors reference is made to U. S. Const., Art. I, §9, subd. 3, but as that is a limitation on Congress only, we presume it was intended to refer to Art. I, §10, subd. 1, which contains the limitation on the states.

We understand that the validity of the law will also be challenged upon the ground that it is in contravention of the treaties contracted between the Government of the United States and various foreign nations.

The Constitutional and Treaty Provisions.

The constitutional and treaty provisions which are claimed to be applicable are as follows:

UNITED STATES CONST., ART. I, §10.

"No state shall * * * pass any * * * *ex post facto* law, or law impairing the obligation of contracts * * *."

UNITED STATES CONST., AMENDMENT V.

"No person shall be * * * deprived of * * * liberty, or property, without due process of law."

UNITED STATES CONST., AMENDMENT XIV, §1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor [a] shall any state deprive any person of life, liberty, or property, without due process of law, nor [b] deny to any person within its jurisdiction the equal protection of the laws.*"

UNITED STATES CONST., ART. II, §2 AND ART. VI, §2.

"He [the President] shall have power, by and with the advice and consent of the senate,

to make treaties provided two-thirds of the senators present concur; * * *." [Art. II, §2].

"This constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding" [Art. VI, §2].

The provision of the TREATY between the United States and ITALY, signed in 1913, which is claimed to be applicable, is as follows:

"The citizens of each of the High Contracting parties shall receive in the States and Territories of the other *the most constant security and protection for their persons and property and for their rights*, including that form of protection granted by any State or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs; and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter."

The provision above quoted was substituted in 1913 for ART. III of the treaty contracted between the United States and Italy in 1871. That Article read as follows:

“ARTICLE III.

“The citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives.

“They shall, however, be exempt in their respective territories from compulsory military service, either on land or sea, in the regular forces, or in the national guard, or in the militia. They shall likewise be exempt from any judicial or municipal office, and from any contribution whatever, in kind or in money, to be levied in compensation for personal services.”

The treaty of 1871 also contains the following Article:

“ARTICLE II.

“The citizens of each of the high contracting parties shall have liberty to travel in the States and Territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established.”

ART. XXII of the Treaty of 1871 confers upon Italian subjects the “most favored nation” privileges with respect to “real estate,” and ART. XXIV of the same treaty confers “most favored

nation" privileges with respect to "commerce and navigation."

The treaties between the United States and various other foreign nations are printed in the Record (Record, pp. 14-26).

In behalf of the defendant-in-error, the Court's attention is called to the correspondence between the provisions of the FIFTH AMENDMENT, which is a restriction upon the National government and its agencies, and those of the FOURTEENTH AMENDMENT, which is a restriction upon the States and their governmental agencies.

No person shall be * *	* * Nor shall any
deprived of life, liberty	state deprive any per-
or property without due	son of life, liberty or
process of law.	property, without due
	process of law. * * *

U. S. Const. Amdt. V.	U. S. Const. Amdt.
	XIV.

The Court's attention is also directed to the following provisions of the United States Constitution:

AMENDMENT IX.

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

AMENDMENT X.

"The powers not delegated to the United States by the Constitution, nor prohibited by

it to the States, are reserved to the States respectively, or to the people."

The Basic Question Involved.

The fundamental question, in its last analysis, reduces itself substantially to the following:

Has the State of New York, a sovereign state, the power to declare, by legislative enactment, the conditions upon which its "public works" shall be performed and upon which persons contracting with it to perform those public works shall perform them?

Stating the question more *specifically* in its relation to the pending case, and to the particular provision of the statute involved, the validity of which is challenged, it comes to this:

Has the State of New York, in declaring its public policy, the power, consistently with the constitution, treaties and laws of the United States, to ordain by legislative enactment that in the construction of "*public works*" by the State or a municipality thereof, or by independent contractors, who (subsequent to the taking effect of the statute) undertake by contract with the State or municipality to construct these public works for and in behalf of the State or municipality, only citizens of the United States shall be employed; in other words, may it, consistently with such constitution, laws and treaties, direct, by legislative provision, that *aliens* shall *not* be employed in such construction?

That is the basic question which is before this Court for decision. And we propose considering it to some extent along general lines, as well as separately with respect to the specific constitutional and treaty provisions with which it is claimed the statute comes in conflict. At the same time, however, our argument shall be framed with

regard to those provisions, and shall be directed to showing that the statute is not, either in its terms or in the enforcement thereof, in conflict with any provision of the Federal Constitution or of any treaty of the United States.

In the State Courts, the statute was attacked on the ground of its repugnance to certain provisions of the STATE CONSTITUTION. The contentions in that respect were overruled. The review of all questions arising under the STATE Constitution ended with the decision of the Court of Appeals. The State Constitution is not taken up into the 14th Amendment.

Hunter *v.* Pittsburgh, 207 U. S. 161;
 Graham *v.* West Virginia, 224 U. S. 616,
 631.
 Ross *v.* Oregon, 227 U. S. 150, 164.
 Southern Pac. Co. *v.* Campbell, 230 U. S.
 537, 552.
 Pullman Company *v.* Knott, 235 U. S. 23,
 27;
 Booth *v.* Indiana, 237 U. S. 391, 395.

POINT I.

The statute does not contravene the Fifth Amendment. That Amendment is directly invokable to sustain it.

1. This amendment is not binding upon the *States* or their governmental agencies. It binds the National government and its agencies only.

Booth *v.* Indiana, 237 U. S. 391, 394.
 Ensign *v.* Pennsylvania, 227 U. S. 592, 597.
 Twining *v.* New Jersey, 211 U. S. 78, 93.
 Thorington *v.* Montgomery, 147 U. S. 490.

2. Indeed, this Amendment may be directly invoked to prevent an annulment of the statute by this Court—an agency of the Federal Government—for, as we shall hereafter point out more fully, the statute is but an assertion of the State's contractual rights—its rights as a “contracting party”. As such it stands in the position of a private person in its relations to the general government (*vid. Ellis v. United States*, 206 U. S. 246, 256; *South Carolina v. United States*, 199 U. S. 437), and is entitled to the same immunity from interference with its contractual rights, as it, in its sovereign capacity, would be obliged to accord to private individuals by virtue of the corresponding provisions of the 14th Amendment (*Coppage v. Kansas*, 236 U. S. 1, 11).

Just as the 14th Amendment prohibits an undue interference by the State with the “freedom of contract” of the individual, with respect to whom he shall employ or refuse to employ (*Coppage v. Kansas*, 236 U. S. 1), so the 5th Amendment equally prohibits an undue interference with the like freedom of contract of the State in its capacity as a proprietor in the conduct of its own business affairs.

As a contractor and proprietor it stands the same as a private person (*Ellis v. United States*, 206 U. S. 246, 256) and possesses the same contractual rights, the same liberty of action.

POINT II.**The statute does not contravene the Fourteenth Amendment.**

In discussing this case with reference to the FOURTEENTH AMENDMENT, we shall consider the statutory provision from two main, and it should be added, distinct points of view, and we purpose to found the right of the State to enact it upon each of those phases of its governmental power which we shall call its:

I. CORPORATE OR CONTRACTUAL POWER—Its power as an organized corporate unit or individual proprietor or master in the conduct of its own proprietary interests and affairs—the construction of its “public works” and the like, the control of its “public” property.

As subsidiary to this we shall consider

1. The relations existing between a State and its municipal corporations; and
2. The status (*a*) of a contractor who undertakes by contract to do “public” work (1) for the State or (2) its municipalities; and also (*b*) the status of his “employee.”

II. POLICE POWER:—Using the term in its more generally accepted sense, in which it is taken to mean, broadly speaking, the power of the State to restrict and regulate the use of liberty and property—to curtail individual freedom of action on the part of persons or classes of persons within its jurisdiction—for the general good and welfare of its people.

Here, a few words of explanation would seem to be appropriate. While no precise definition of the

term "POLICE POWER" has been attempted by the Courts, it has more generally, and, perhaps, with greater propriety, been used, in the discussion of questions of American Constitutional Law, to denote that power by which the State, in its governmental or sovereign capacity, may, within certain undefined limitations, subject the individual to all sorts of burdens and restraints for the public good—the power, broadly speaking, of "restraining and regulating the use of liberty and property,"—the power of restricting freedom of action, or freedom of contract, on the part of persons or classes of persons within its jurisdiction—for the common good, among its various and more usual attributes being the promotion of the public health, morals, safety, and general welfare, for the advancement of which the rights of the individual, never absolute, must yield whenever the concession is demanded in the interest of, and for the welfare of the community as a whole.

The "Police Power", in this restrictive sense, has found its expression in many and varied forms. The cases in which it has been discussed are both numerous and familiar, the specific question involved and decided in each being whether, in the given instance, the State had, by the restraints or commands in question, unduly infringed or arbitrarily interfered with existing *private rights*—of private parties—granted or secured by the fundamental law of the Constitution, and had thus passed the limits set by that instrument for the exercise of its power.

But the term "Police Power" has sometimes been used in a broader sense, and taken to embrace "all the operations of society and government" (2 Hare's Am. Const. Law, 766), and to

include "*all legislation and almost every function of civil government*" (*Barbier v. Connolly*, 113 U. S. 27; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 661; *Sligh v. Kirkwood*, 237 U. S. 52, 59). It has been recognized as including within its scope not only the power to prescribe regulations to promote the health, peace, morals, education and good order of the people—its more usual attributes—but also the power "to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity" (*Barbier v. Connolly*, 113 U. S. 27, 31), among its attributes in that respect being the establishment and maintenance of roads, wharves, ferries, telegraph lines and other public utilities (*New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 661)—including sewers (*Paulsen v. Portland*, 149 U. S. 40).

It has been said that it is the power of the State "to govern men and things within the limits of its dominion", that it is nothing more or less than "the powers of government inherent in every sovereignty to the extent of its dominions" (*License Cases*, 5 How. 504, 583; *Munn v. Illinois*, 94 U. S. 113, 125); that it "has, at bottom, no other meaning than the general power of governing its people and dominions, belonging to every sovereignty" (*Appeal of Allyn*, 81 Conn. 534); that it includes all the powers of the States "necessary to their internal government" (*Passenger Cases*, 7 How. 283, 424), and the right of the State "to preserve and protect its own autonomy at all times" (*Tucker, Lim. Treaty-Making Power*, p. 287).

It has been said that it is "by virtue of this power that it *legislates*" (*License Cases*, 5 How.

504, 583); and that the term "Police Power" is often used to express "*the sum of the legislative power of the State not within the limitations of the Federal and State Constitutions*" (Dillon, Mun. Corp., [5th Ed.], Vol. 1, p. 145, note), including the power which the State exercises over municipal corporations, and the delegated power which such corporations, as agents of the State, have over their streets, and their use as highways and the like (*People v. Kerr*, 27 N. Y. 188, 213). In short, it may be said to be synonymous with "*legislative*" or "*State*" power.

Speaking of the "police power" in a very recent case, this Court said, *per* MR. JUSTICE DAY:

"At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the State, whether in their public or private relations, whether it related to the rights of persons or property of *the public* or any individual within the State. *New York v. Miln*, 11 Pet. 102, 139. The police power, in its broadest sense, includes *all legislation and almost every function of civil government.*"

Sligh v. Kirkwood, 237 U. S. 52, 59.

The term is used in this broad sense by SEABURY, J., in his concurring opinion in the Court of Appeals, and, accordingly, he includes within it, as one of its phases, the power of the State to control its *public* property, to regulate its proprietary affairs, to construct its "public works" and the like (Opin. of Seabury, J., Record, p. 57 *et seq.*). In other words, he considers, as one of the phases or attributes of "Police

Power," that power to which we have referred as the State's "*Corporate or Contractual Power.*"

It is, however, of but little, if any, practical importance whether we regard this "*Corporate or Contractual Power*" as an attribute of the State's "Police Power"—using the term in its broad sense—or as a separate and distinct phase of State power inherent in the State by virtue of its *quasi-corporate*, rather than its strictly governmental or *sovereign* capacity.—What we wish to emphasize is that the State itself possesses "contractual rights," and that these must be distinguished from its "police power" in the ordinary sense, under which the State, as the sovereign, *restricts* the "contractual rights" or rights of liberty and property of *private individuals* for the common good or general welfare.

If we treat it as a phase of "Police Power," it would be necessary for the purposes of our discussion to divide "Police Power" into *two* separate parts, and to keep the distinction between them in mind throughout the entire consideration of the case. These two parts may be briefly described as follows:

1. *Corporate, Proprietary or Contractual*:—including the power of the State, in its capacity as a proprietor or master, to deal with its *own* property and proprietary interests and affairs;

2. *Regulative and Restrictive*:—including the power of the State, as a sovereign, to regulate and restrain the liberty and property of private individuals for the common good.

This Court has said that "the police power is in its fullest and broadest sense reserved to the States"; and that "the mode of exercising that

power is left to their discretion, and is not subject to National supervision."

South Carolina v. United States, 199 U. S. 437, 454.

House v. Mayes, 219 U. S. 270, 281-282.

It is, of course, true that:

"Definitions of the police power must, however, be taken, subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government[‡] or rights granted or secured by the supreme law of the land."

New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 651.

Keller v. United States, 213 U. S. 138, 146.

Mich. Cent. R. R. v. Vreeland, 227 U. S. 59, 66-67.

Concededly, a State enactment, even if based upon its police or other reserved power,

"must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution,[‡] or with any right which that instrument gives or secures."

Jacobson v. Mass., 197 U. S. 11, 25.

But, on the other hand, it must also be borne in mind that the Federal government is one of enumerated powers surrendered to it by the States and their people, and while it is supreme

[‡]Note, for example, the cases involving a conflict between State "police power" and the commerce clause of the Constitution which grants a *specific* power to the general government (*Minnesota Rate Cases*, 230 U. S. 352; *Sligh v. Kirkwood*, 237 U. S. 52, 58).

within the sphere of its delegated powers and no state can enforce laws which usurp or come in conflict with functions vested in the Federal government, with respect to which it has acted, the States are equally supreme within the sphere of the reserved powers—which include all matters relating to their internal government and affairs.

House v. Mayes, 219 U. S., 270, 281-282.

South Carolina v. U. S., 199 U. S., 437, 453-454.

Leisy v. Hardin, 135 U. S., 100, 127.

Presser v. Illinois, 116 U. S., 252, 268.

New York v. Miln, 11 Pet., 102, 139.

Gibbons v. Ogden, 9 Wheat, 1.

Northwestern Fertilizer Co. v. Hyde Park, 97 U. S., 659, 667.

Collector v. Day, 11 Wall, 113, 125.

Prigg v. Pennsylvania, 16 Pet., 536, 624.

And among the foremost of the duties of this Court is to hold the balance true between the Federal powers and limitations on the one side and the State powers on the other, giving to each its full weight, neither exaggerating or diminishing its relative importance, always remembering that “the Constitution, in *all* its provisions, looks to an indestructible Union of indestructible States” (*Texas v. White*, 7 Wall, 700, 725; *Keller v. United States*, 213 U. S., 138, 149), and that in matters of internal policy the State is the final arbiter.

In the presentation of our argument, we purpose using the term “Police Power” in the sense in which we have heretofore defined it (*ante*, p. 14), the power of restricting individual free-

dom of action for the common good, such as the promotion of the public health, safety, prosperity and the like, and, treating the power of the State, (viewed primarily as an organized corporate unit) to conduct its own proprietary affairs—the construction of its “public works” and the like as a distinct phase of State power which, for want of a better term, we shall call its “*Corporate or Contractual Power*”—viewing it as a separate part of

“that immense mass of legislation, which embraces everything within the territory of a State not surrendered to a general government; all which can be most advantageously exercised by the States themselves.”

Minnesota Rate Cases, 230 U. S., 352, 411.
Gibbons v. Ogden, 9 Wheat., 203, 304.

Thus, as we stated at the outset, the two main topics of discussion and the two separate phases of STATE POWER, upon which we shall found the validity of the statutory provision in question, are:

I. THE POWER OF THE STATE AS A PROPRIETOR OR MASTER IN THE CONDUCT OF ITS PROPRIETARY AFFAIRS—ITS “CONTRACTUAL” POWER WITH RESPECT TO ITS “PUBLIC” UNDERTAKINGS.

II. “POLICE POWER” IN THE MORE GENERALLY ACCEPTED SENSE—THE RESTRICTIVE POWER EXERCISED BY THE SOVEREIGN OVER THE “LIBERTY” AND “PROPERTY” OF THE INDIVIDUAL FOR THE COMMON GOOD.

In order to avoid confusion, we shall discuss each of these questions by itself, although, to some extent, the discussion of the one may run into that

of the other; but this, we shall endeavor to avoid, as far as possible.

The basic theory upon which we shall found the validity of the statute in the first place is that of "FREEDOM OF CONTRACT"—with respect to which we shall contend, and confidently hope to demonstrate, that the State in conducting its proprietary affairs, and as a "contracting party," has no less liberty of action than any of its citizens.—The statute, it will be noticed, only relates to the "construction of *public* works". In these the State is the "proprietor and master." [Ryan v. City of New York, 177 N. Y. 271.]

The basic theory upon which we shall found the validity of the statute in the second place is that of "RESTRICTION OF CONTRACT" on the part of individuals or classes of individuals brought about by the exercise of the State's "police power"—as heretofore defined.

The distinction between the two powers to which we have referred must be kept clearly in mind, for it is of the utmost importance in determining the authorized *extent* of the exercise of the power, which the State has assumed to exercise in a given case, and, hence, in determining the *validity* of its exercise.

Before we proceed to a specific consideration of the two main topics which we have outlined for discussion under this point, there are some matters of a general nature to which we shall refer by way of introduction, particularly as they serve to illustrate the distinction between the two powers to which we have referred, and the importance of bearing it in mind.

Considering the question with reference to the Federal Constitution, the "POLICE POWER" is, so to speak, bounded by the territorial line of the 14th Amendment, on whose domain it cannot trespass; and while this line is difficult to fix and is, as MR. JUSTICE HOLMES has said, "pricked out by the gradual approach and contact of decisions on the opposing sides" (*Noble State Bank v. Haskell*, 219 U. S. 104, 112), it exists none the less as a concrete or practical reality. Affecting, as it does, the "liberty" and "property" of others—as distinguished from that of the State itself—the "Police power" must stop at the border line of the Constitution.

The rights of liberty and property, the right of "freedom of contract" are *not* absolute. They are subject to many restraints. But these restraints must end where the Constitution begins.

Frisbie v. United States, 157 U. S. 160, 165.

Holden v. Hardy, 169 U. S. 366, 391.

Muller v. Oregon, 208 U. S. 412.

Lochner v. New York, 198 U. S. 45.

But the "*Corporate or Contractual Power*"—the power of the State as an organized unit or as a proprietor or master to conduct *its own* affairs—does *not* touch the 14th Amendment at all, but is bounded only by the broad sea of public opinion—public policy—expressed by the State either in the form of State constitutional provision or statutory enactment, a consideration outside the scope of Federal cognizance (*Atkin v. Kansas*, 191 U. S. 207, 223)—provided always that the action of the State does not unduly interfere with inherent or vested rights of private parties, or deny them the protection and security to which are entitled. This *proviso* is, in truth, unnecessary, because

when the exercise of the power assumes a form or direction which involves an interference with the "liberty" and "property" *of others* it no longer belongs to the "Corporate", but to the "Regulative" or "Restrictive" phase of the general power, and it must, accordingly, stop at the border line of the Constitution. It is subject to the limitations placed on the "police power" thereby. The Constitution in throwing around the liberty, property and inherent rights of the individual, the shield of its protection, in effect, says: "Thus far shalt thou go and no further."

Of course, in all of its phases, the State power is, or should be, exercised for the promotion of the public good or the general welfare of the State. But between the two phases thereof, to which we have referred, there is this difference. In its former aspect, the extent to which the power shall be exercised depends upon considerations of "policy" alone—concerning which the State is the sole arbiter. (*St. Benedict Order v. Steinhauser*, 234 U. S. 640, 649.) In its latter aspect, the will of the State is subject to the constitutional restraints upon its exercise—for vested or inherent rights *of private persons* may become involved.

The essence of the distinction lies in the fact that in exercising its "Corporate or Contractual Power" the State is dealing with *its own* property or proprietary affairs with respect to which the individual has no inherent rights of "liberty" or "property" (*Atkin v. Kansas*, 191 U. S. 207) and with respect to which the State stands, in its corporate capacity, as a "contracting party", the same as any of its citizens (*Ellis v. United States*, 206 U. S. 246), while, in exercising its "Police Power", the State, in its governmental (sove-

reign) capacity, is dealing with liberty and property and inherent rights of individuals; and because—and only because—the rights of liberty and property of private persons are involved the question would arise as to whether or not these rights and the security given to them by the Fourteenth Amendment, had been unduly affected by the manner, form or direction in which the State had assumed to exercise its power.

Before the FOURTEENTH AMENDMENT can be invoked or brought into operation, either with respect to its “due process” or “equal protection” provisions, there must be some *right* of liberty or property of the *individual* guaranteed thereby, with respect to which the State has adversely acted. Before there can be a “deprivation” of liberty or property, there must be some “liberty” or “property” of which the individual can be deprived. Before there can be a denial of “equal protection” of the laws, there must be some right to which the security and protection of the Constitution is extended. The 14th Amendment granted no new rights. It secured existing rights.

A person cannot be deprived of that which he does not possess. A person cannot be denied equal “protection” unless there is something to protect—some inherent right or attribute of liberty or property with respect to which he is entitled to “protection” and with respect to which the State, by its action, has accorded it to some and denied it in like measure to others similarly situated. The existence of some guaranteed right is a *condition precedent* to the making of a claim that one has been “deprived” of it or that one has been denied equal “protection” and security with respect to it.

In *New Orleans v. N. O. Water Works Co.* (142 U. S. 79, 88), this Court said that

“to constitute a violation of the provision against depriving any person of his property without due process of law, it should appear that such person *has a property* in the particular thing of which he is alleged to have been deprived”

New Orleans v. N. O. Water Works Co., 142 U. S. 79, 88.

[Cf. *Atkin v. Kansas*, 191 U. S. 207—considered fully hereafter, pp. 48-54].

The “due process” and “equal protection” provisions of the Fourteenth Amendment are largely synonymous, and a general review of the cases will show that the two ideas are closely associated in the minds of the courts. An arbitrary discrimination against particular persons or classes of persons by which they are subjected to burdens or restraints, respecting their liberty or property rights, would constitute a violation of the “due process” as well as the “equal protection” provision. But the “equal protection” provision may be regarded as supplemental to the other. Not only are the rights of liberty and property guaranteed against arbitrary deprivation, but the same measure of protection of those rights shall be given to all in similar circumstances.—The power of “classification” will be considered later.

In *Phoenix Ins. Co. v. McMaster* (237 U. S. 63, 72) this Court said:

“The equal protection of the laws, as this Court has frequently decided, means subjection to equal laws applying alike to all in the same situation, or as expressed by Mr. Jus-

tice Field, speaking for this court in *Barbier v. Connolly*, 113 U. S. 27, 31,—a case much relied upon by the plaintiffs in error.—*equal protection of laws means 'that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, IN THE ENJOYMENT OF THEIR PERSONAL AND CIVIL RIGHTS. . . . That no greater burdens should be laid upon any one than are laid upon others in the same calling and condition'.* In this general definition, the court recognizes, as it always has, that what the equal protection of the law requires is equality of burdens upon those in like situation or condition.”

Phoenix Ins. Co. v. McMaster, 237 U. S. 63, 72-73.

The guaranty of “equal protection of the laws” is “a pledge of the protection of equal laws” (*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 559; *Yick Wo v. Hopkins*, 118 U. S. 356, 369). It imposes a limitation on all the powers of the state “*which can touch the individual or his property*” (*In re Grice*, 79 Fed. Rep., 627, 645) and means that the same protection that is given to one, *with respect to his inherent rights of liberty and property*, shall be given to all others similarly situated and in like condition.

Clark v. Titusville, 184 U. S. 329.

Marchant v. Penn. R. Co., 153 U. S. 380.

Hayes v. Missouri, 120 U. S. 68.

Barbier v. Connolly, 113 U. S. 27.

The point we desire to emphasize is that, however wide may be the sphere of operation of the “equal protection” clause of the 14th Amend-

ment or the class of "rights" to which it extends, there must be some existing "right", entitled to protection or security, before there can be any basis for a claim that protection or equality of protection has been denied—a proposition which is assumed and recognized in all the cases on the subject.

The fundamental mistake of the plaintiff-in-error, and of the learned judges below who deemed the statute unconstitutional, is that they, while recognizing the truth of the general proposition that the right to labor at a lawful trade or calling is a right of "liberty" and "property" (*Coppage v. Kansas*, 236 U. S. 1; *Smith v. Texas*, 233 U. S. 630, 636), overlooked the proposition, equally true, that no one is entitled of absolute right and as a part of his liberty or property to work for another against that other's wishes (*Coppage v. Kansas*, 236 U. S. 1, 10) or to work or perform labor for the State (*Atkin v. Kansas*, 191 U. S. 207, 223) that "liberty of contract" includes both parties to it (*Lochner v. New York*, 198 U. S. 45, 56).—This will be more fully considered hereafter.

The distinction between the two powers, to which we have referred, and, indeed, the transition from the one to the other, may be clearly seen in noting the ascending measure of control from (1) that which may be exercised over individuals and corporations with respect to matters *wholly private* (*Lochner v. New York*, 198 U. S. 45; *Williams v. Arkansas*, 217 U. S. 79; *Coppage v. Kansas*, 236 U. S. 1) to (2) that which may be exercised with respect matters *semi-public* or "affected with a public interest" (*Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S.

517, affg. *People v. Budd*, 117 N. Y. 1; *Brass v. Stoesser*, 153 U. S. 291; *Noble State Bank v. Haskell*, 219 U. S. 104; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389), to (3) that which may be exercised with respect to matters *wholly public*—when the power becomes absolute, and examples of which are seen in the control by the State of its municipal corporations in all their public undertakings and affairs (*Williams v. Eggleston*, 170 U. S. 304; *Atkin v. Kansas*, 191 U. S. 207; *Hunter v. Pittsburgh*, 207 U. S. 161; *People ex rel. W. E. & C. Co. v. Metz*, 193 N. Y. 148; *Ryan v. City of New York*, 177 N. Y. 271).

This absolute power arises from the proprietary relationship of the State to the matters in question. A question of "power" becomes one of "policy" (*Atkin v. Kansas*, 191 U. S. 207, 222). This Court has emphatically stated that:

"The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 414.

Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 569.

The action of the Legislature touching such matters may on occasion be harsh; it may be unwise; it may be unjust; it may be based upon wrong economic principles; but against all these the remedy is *not* with the courts. It lies with the people of the State in whom is ultimately vested all the sovereign power, who *are* the sovereign, and in whose conceptions of justice, in whose inherent sense of right and wrong the just rights of all men will rest secure. They may be safely entrusted to American common sense and American intelligence.

The appreciation of the difference between *policy* and *power*, or between the extent of the State's power in regulating and controlling *its own* affairs and the extent of its power in regulating and controlling the *private* affairs of others, on the one hand, and the failure to appreciate these distinctions on the other hand, lies at the basis of the difference of opinion between the six learned judges of the Court of Appeals on the one side, and the learned dissenting judge (together with the Justices of the Appellate Division) on the other side. And here we might say, without attempting to enter into an extended analysis of the opinions of the judges of the Court of Appeals, that the basic underlying conception of the subject, as disclosed in the opinions written by Judge CARDOZO, Chief Judge WILLARD BARTLETT and Judge SEABURY, respectively, is founded upon the same broad principle and is fundamentally one and the same; that they only differ in reality in nomenclature and in the mental processes or lines of reasoning and argument by which, starting from the same basic proposition, they respectively reached the same ultimate conclusion; while

the fallacy in the dissenting opinion of Judge COLLIN is that he failed to appreciate the distinction between "policy" and "power," and that he (as did also the Appellate Division of the Supreme Court of New York) confused the general inherent right of the individual to labor at a lawful trade or calling and to make any and all contracts conducive to that end, with an assumed, but in truth non-existent, so-called "right" to work or perform labor *for the State*. He overlooked the proprietary or "contractual" relationship of the State to the matters in question (*Atkin v. Kansas*, 191 U. S. 207; *Ellis v. United States*, 206 U. S. 246, 256), and the fact that the purchaser and seller of labor have "equality of right" (*Coppage v. Kansas*, 236 U. S. 1), that both "contracting parties" have a like equality, that "the liberty of contract relating to labor includes *both parties* to it" (*Lochner v. New York*, 198 U. S. 45, 56).

THE OPINIONS BELOW.

JUDGE SEABURY placed the right of the State to declare whom it would employ or not employ in its *public* undertakings, and thus to declare that aliens would not be permitted to labor in the construction of its public works, upon its "police power" (in the broad acceptation of the term) which power he held to include, as one of its phases, the absolute right of the State to control its *public* property and to conduct *its own* affairs.*

*It will be borne in mind throughout our argument that we are dealing only with questions of Federal Law, that all questions arising under the *State* constitution have been finally disposed of.

THE CHIEF JUDGE placed its right so to do upon its contractual power, as a proprietor or master, in the conduct of its own affairs, treating this power as a different one from that which is commonly called "police power". He held, in substance, that, in the respect mentioned, the state had no less liberty of action than any of its citizens.

JUDGE CARDOZO (whose opinion is that of the court) placed its right so to do upon its power to determine for itself how and to whom it would distribute its money, its property and its individual or proprietary resources—who should be the recipients of its bounty and its favors.*

JUDGE COLLIN founded his whole argument on a fallacy. He assumed that because a man had the right to labor at a lawful trade or calling, and that as this was a right of liberty and property, it gave him the "right" to labor for the State—irrespective of the wishes of the State in the matter. He said the statute "declares that an alien shall not be permitted to be a laborer"—which, of course, is not what the statute declares. It declares that the State does not desire him as one of its laborers in building its "public works". The learned judge also cited *Coppage v. Kansas* (236 U. S. 1) but misconstrued it, we submit, for he denied to the State the rights to which this Court held the employer of labor was entitled—the right to refuse to employ a person or persons for any reason that to him seemed sufficient [*vid. post*, pp. 39-40].

The answer to JUDGE COLLIN's opinion is that the restraints for which he contends, as respects

this case, upon the legislative power of the State, in matters which concern it in its corporate or individual capacity, in the conduct of its public undertakings, in which it acts as the proprietor or master, are to be found, not in the written law of the FEDERAL CONSTITUTION, nor in its interpretation by the courts, but in the force of an aroused public conscience expressed through the medium of the ballot box in the form of legislative enactment or state constitutional provision—a force to which legislatures, courts and even the constitution, as theretofore written, must ultimately give way, for it is the greatest force of all; and it may be depended upon for the correction of legislative unwisdom and for remedial justice against legislative wrongs—if they exist.

MR. JUSTICE JOHNSON, speaking for this Court, has said that “The power existing in every body politic is an absolute depotism” (*Livingston v. Moore*, 7 Pet. 469, 546).

In *Munn v. Illinois* (94 U. S., 113, 134), the Court said:

“We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts” [p. 134].

THE BASIS OF THE PLAINTIFF-IN-ERROR'S CONTENTION.

As the basis for their contention that the statutory provision in question is in conflict with the Fourteenth Amendment, the learned counsel for the plaintiff-in-error take, as a postulate, the oft-asserted general principle that the rights of “lib-

erty" and "property" guaranteed against deprivation by the State or its governmental agencies include the right of the individual to be free to work where and for whom he will, to earn his livelihood by the pursuit of a lawful occupation or calling, and to make any and all contracts that may be conducive to those ends, that the common occupations of life are open to all in similar circumstances, on the same terms, that the employer and employee may buy and sell labor upon such terms as may be mutually satisfactory, that the employer of labor may employ whomsoever he will, and the seller of labor may work where and for whom he will and sell his labor to anyone willing to purchase it, and that equal protection and security shall be given to all under like circumstances in the enjoyment of their personal and civil rights.

The correctness of these principles, in a general sense, is in no wise disputed. They have been frequently asserted by this and other courts.

Barbier v. Connolly, 113 U. S. 27, 31-32;
Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 559;
Allgeyer v. Louisiana, 165 U. S. 578, 589;
Williams v. Fears, 179 U. S. 270, 274;
Lochner v. New York, 198 U. S. 45, 58;
Coppage v. Kansas, 236 U. S. 1.

And it is not disputed that the word "persons" in the 14th Amendment includes "aliens" as well as citizens.

Yick Wo v. Hopkins, 118 U. S. 356.

Of course, these general rights are in no sense absolute. They are subject to many restraints

under the "Police Power." But with that we are not immediately concerned.†

Holden v. Hardy, 169 U. S. 366.

Jacobson v. Mass., 197 U. S. 11.

Chicago B. & Q. Ry. v. McGuire, 219 U. S. 549, 566-568.

Williams v. Arkansas, 217 U. S. 79, 88-89.

Miller v. Wilson, 236 U. S. 373, 380.

These rights "may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its statutes."†

Allgeyer v. Louisiana, 165 U. S. 578, 591.

Williams v. Fears, 179 U. S. 270, 274.

Founding their arguments then on the assertion of a *general* "right to labor" and "freedom of contract", counsel contend that the statutory provision in question, which declares that—we call attention to its language—"in the *construction of public works* by the State or a municipality, or by persons contracting with the State or such municipality only citizens of the United States shall be employed", unjustifiably:

1. Deprives the aliens of the right to labor and earn their livelihood by the pursuit of a lawful occupation, by

(a) prohibiting their employment by the State;

(b) prohibiting their employment by a municipality;

(c) prohibiting their employment by the contractors.

†The validity of the statute as an exercise of "police power" will be considered later.

2. Discriminates against "aliens" as a class by excluding them from employment open to all others.

3. Deprives the contractor of the right to employ whom he will in the performance of the work which, in the pursuit of his business enterprises, he has undertaken to perform; and

4. Discriminates between contractors for the construction of public works and those engaged in work of a private character.

This, it is argued, constitutes (a) an unwarranted interference with the "freedom of contract" both of the "contractor" and the "alien" and (b) unreasonable and arbitrary classifications, and, as a result, deprives both the contractor and the alien of liberty and property without due process of law, and a denial to them of the equal protection of the laws.

The fallacies in their argument are:

1. That it disregards the peculiar nature of the work to which the statute refers, and the position which the State occupies in relation thereto.

2. That it disregards the essential element of "equality" in freedom of contract, ignoring also the truth of the proposition that, with respect to the purchase and sale of labor, the purchaser and seller have equality of right—that the State as a contracting party has the same liberty of action as any of its citizens.

3. That it regards as inherent rights of liberty and property things which in truth are not such at all—confusing the general right to labor with a so-called, but in fact non-existent, right to labor for the State—irrespective of its wishes or desires as an employer.

It will indeed, we submit, be found upon a critical examination and analysis of the argument of the plaintiff-in-error that, while asserting and contending for the "freedom of contract", he claims it to the fullest extent for himself and his immediate workman, but denies it to the other contracting party—the State; and thus his argument, in order to reach his conclusion, involves a denial of the major premise upon the truth and universality of which he purports to found it.

I. The State's "Contractual Power".

Assuming that the "freedom of contract", guaranteed by the fundamental law, which permits the individual to employ or refuse to employ whomsoever he will in the conduct of his private business (where no question of public policy or the general welfare is involved†) exists to the fullest extent, and that legislation unduly restricting that right might in certain cases be successfully challenged as invalid (*Coppage v. Kansas*, 236 U. S. 1; *Adair v. United States*, 208 U. S. 161; *Lochner v. New York*, 198 U. S. 45), and applying this principle to the statutory provision in question and making it "the test of the arguments to be examined", it will be found, upon careful analysis, that one of the basic theories, upon which the constitutionality of *this* law can be *sustained* is fundamentally the same as that upon which a law restraining the right of a *private* individual to employ or refuse to employ whom he will in his *private* capacity might be deemed invalid (*Coppage v. Kansas*, 236 U. S. 1).

†We are not here concerned with the restrictions on the freedom of contract which the State, in its sovereign capacity, may impose under the "Police Power". That will form a topic for separate discussion.

It should be borne in mind throughout the discussion of this case, that the statutory provision, the validity of which is drawn in question, places no restrictions on the employment of aliens by *private* persons in the conduct of their *private* enterprises, that it relates solely to the construction of the "*public works*" of the State and its municipalities, and has no application to and does not exclude aliens from the performance of *private* work for *private parties*—a distinction which is of *vital* importance and must *always* be kept in mind (*Atkin v. Kansas*, 191 U. S. 207).

While it may seem somewhat paradoxical, these "public works" might be called the "private" enterprises of the State, for that is what, in one sense, they are, although called "public", because of their public or governmental nature—being undertaken by the State itself in its role of proprietor; and whether the public works are constructed by the State itself or by one of its political subdivisions or subordinate governmental agencies—its municipalities and the like—or by contractors who undertake the construction of such works by contract with the State or municipality, the State is, in all these public undertakings, the proprietor and master, and entitled, as is an individual, to all the rights that appertain to it in that capacity. The State is, so to speak, the employer; the "contractor" and the alien are, so to speak, the employees. Such are their relative positions. The State is the purchaser of labor, the contractor and the workman are the sellers thereof. The State is a "contracting party", and as such stands as a private person and possesses the same contractual rights (*Ellis v. United States*, 206 U. S. 346).

In *Coppage v. Kansas* (236 U. S. 1, 10-11), Mr. JUSTICE PITNEY writing for this Court, quoted the language of Mr. JUSTICE HARLAN in *Adair v. United States* (208 U. S. 161, 174):

"The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.

* * * * *

"In all such particulars the employer and the employe have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

Coppage v. Kansas, 236 U. S. 1, 10-11.

Adair v. United States, 208 U. S. 161, 174.

It is further pointed out in those cases that just as no one can be compelled against his will to work or perform services for another, so no one can be compelled against his will to accept or retain the services of another. [236 U. S. 1, 10, 24]. In all such matters there is "equality of right." "The liberty of contract relating to labor includes both parties to it" (*Lochner v. New York*, 198 U. S. 45, 56). The individual may pursue his vocation in any manner "not inconsistent with the equal rights of others" (*Butcher's Union Co. v. Crescent City Co.*, 111 U. S. 746, 757). Rights must sometimes yield to others or to principles of policy which overcome them (*Hudson Co. Water Co. v. McCarter*, 209 U. S. 349, 355).

The broad principle that underlies the decisions in *Coppage v. Kansas* (*supra*) and *Adair v. United States* (*supra*), is that the employer has the right

to promulgate his own rules or declare his own policy as to whom he shall employ or refuse to employ—that the right of the master to refuse to employ is as complete as that of the workman to perform labor for hire.

Carrying the principle to which we have referred along the lines of its logical development, it may be said:

The head of a large business enterprise may employ or refuse to employ whomsoever he will and for *any reason* that to him seems sufficient (*Coppage v. Kansas*, 236 U. S., 1, 10, 24; *Adair v. United States*, 208 U. S., 161; *People v. Marcus*, 185 N. Y., 257; *Jacobs v. Cohen*, 183 N. Y., 387; *Nat. Prot. Assn. v. Cumming*, 170 N. Y., 215). If he chooses to refuse to employ anybody but citizens of the United States in the conduct of his business, he has an undoubted right to do so.

The head of such a business enterprise may employ agents and departmental managers to conduct the various departments of his business and he may make, as a condition of the contract of employment between him and those agents or heads of departments, that they, in the conduct of the business or of the particular department under their direction and supervision, shall employ only such persons as he shall prescribe; and he may, if he sees fit, include in the contract, as a condition of the managers of the various departments working for him, that their subordinates or workmen shall be citizens of the United States and that none others shall be employed.

Has not, then, the State the same right as the private individual to declare whom *it* shall employ in the conduct of its "public" undertakings; and has it not the same right to say that its various political subdivisions or governmental agen-

cies (which owe their very existence to its uncontrolled will, which created them, and conferred upon them the powers they possess, and which may destroy them at its pleasure) shall be restricted by such regulations as it may see fit to impose, respecting the subordinates whom they shall employ in public undertakings?

And has not the State for itself and for each of its separate governmental agencies the right to declare that, with respect to works of a *public* nature done by contract, the person contracting to do that work shall only employ such persons as the State may direct, and to place a restriction, if it sees fit to do so, upon the classes of persons who may be employed by the contractor? There can be, we submit, but one answer to that question—an affirmative one.

- Atkin *v.* Kansas, 191 U. S. 207;
- Ellis *v.* United States, 206 U. S. 246;
- United States *v.* Martin, 94 U. S. 400;
- Ryan *v.* City of New York, 177 N. Y. 271;
- People *v.* Orange Co. R. C. Co., 175 N. Y. 84, 90;
- People *ex rel.* Cossey *v.* Grout, 175 N. Y. 479;
- People *ex rel.* Williams E. & C. Co. *v.* Metz, 193 N. Y. 148, 163;
- People *v.* Luddington Sons Inc., 74 Misc. (N. Y.) 363;
- Coppage *v.* Kansas, 236 U. S. 1, 10;
- Adair *v.* United States, 208 U. S. 161.

And this is so even though "alienage" forms the basis of the classification (*Patsone v. Pennsylvania*, 232 U. S. 138).‡

In considering the validity of the exercise of that particular phase of State power with which we are now concerned—its "corporate or contractual power"—the question of "classification", or discrimination against a particular class, does not really enter at all.‡

In *People ex rel. Williams E. & C. Co. v. Metz* (193 N. Y. 148, 165) the Court said:

"We have thus considered the subject of discrimination along the line of discussion adopted by counsel, but we regard it as of slight importance in this case because in the legislation in question the state was dealing with *its own* creations and could discriminate as it saw fit".

People ex rel Williams E. & C. Co., 193 N. Y. 148, 165.

But we shall also contend that under the "police power" a classification between citizens and aliens which excludes the latter from employment in the "*construction of public works*" of a State would not be invalid under the equal protection provision of the Fourteenth Amendment (*Comm. v. Patsone*, 231 Pa. St. 46, 51; *Patsone v. Pennsylvania*, 232 U. S. 138), notwithstanding that aliens are "persons" within the meaning thereof (*Yick Wo v. Hopkins*, 118 U. S. 356).

This question will, however, be separately considered hereafter, though it may here be said, but

‡The *Patsone* case and the question of classification will be considered hereafter and discussed in connection with "Police Power." The "alien" cases are collated subsequently.

only as foreshadowing the future argument, that to the proposition that "no employe is entitled of absolute right and as a part of his liberty, to perform labor for the state" (*Atkin v. Kansas*, 191 U. S. 207, 223), there may be added the further proposition, equally true, that:

"We legislate primarily for our own citizens in granting the special privileges that are independent of our inherent rights. The alien is prohibited from doing many things to which a natural-born or a naturalized citizen is entitled".

Comm. v. Patsone, 231 P. St. 46, 51; *aff'd* as *Patsone v. Pennsylvania*, 232 U. S. 138.

—Of course, there is involved the incidental classification in the misdemeanour feature of the statute, which makes a classification between contractors on public works and contractors on private works, the former being, in a sense, punishable for a breach of their contracts and the latter not. But such a classification is clearly valid. It affects alike all similarity situated. (*Atkin v. Kansas*, 191 U. S. 207), [*vid. post*, pp. 53, 75 *et seq.*]

The STATE is in the same position as would be a private person, so far as the unrestricted right to employ whom he pleases is concerned. The individual as an employer of labor and the State as an employer of labor stand on the same footing (*Ellis v. United States*, 206 U. S. 346; *People v. Orange County R. C. Co.*, 175 N. Y. 84, 89, 90; *People v. Luddington*, 74 Misc. 363). The individual may make regulations for the guidance of his subordinates or agents as to whom they shall employ in the conduct of his business. *The*

State may do likewise. The soundness of that proposition, which lies at the very heart of this case, cannot, and we believe will not, be disputed.

Therefore, the question comes down to this:

If the private individual has the right to decide whom he shall employ and whom he shall not employ in the conduct of his business, has not the State the same right?

The concession of the one principle necessarily requires the concession of the other.

The only method by which the State can give expression to its desires, upon such a subject, is through the medium of *legislative enactment* because its legislative assemblies exercise all the powers which are inherent in the State itself except in so far as they are restricted by express and specific constitutional provisions (*People ex rel. Simon v. Bradley*, 207 N. Y. 592, 610).

The State, in enacting a statute upon such a subject for the guidance of its subordinates or for those engaged in performing work for it or in its behalf, is doing precisely, and in the only form in which it can do it, what an individual or a private person would—and lawfully could—do in the promulgation of rules and regulations which he desired to adopt in and for the conduct of his private business. The statute is the direction of the State as the proprietor or master. It is a direction of the principal to its agents (*United States v. Martin*, 94 U. S. 400, 404). It is a resolution respecting its employment policy. It is a contract stipulation rather than a law in the sense of a sovereign mandate of the government to its citizens or subjects.—The misdemeanor feature is, of course, a direct incident of “sovereignty”

(*Ellis v. United States*, 206 U. S. 246, 255, 256),
[*vid. post*, p. 61.]

In *Ellis v. United States* (206 U. S. 246, 256)
MR. JUSTICE HOLMES, speaking for this Court
said:

“The government purely as a contractor,
in the absence of special laws, may stand like
a private person * * *.”

This was said in upholding a law of Congress
which limited the hours of labor of laborers and
mechanics employed by the United States or any
contractor or sub-contractor upon any of the
“public works of the United States.”

And in *United States v. Martin* (94 U. S. 400,
404) speaking of a somewhat similar statute, the
Court said:

“We regard the statute chiefly as in the
nature of a direction from a principal to his
agent * * *.”

In *People v. Orange County Road Cons. Co.*
(175 N. Y. 84, 90) CULLEN, CH. J., said:

“If the state itself prosecutes a work it
may dictate every detail of the service re-
quired in its performance; prescribe the
wages of workmen, their hours of labor and
the particular individuals who may be em-
ployed. * * * The state in this respect
stands the same as its citizens. Its rights
are just as great as private citizens but no
greater” [p. 90].

The same principle was recognized in *Clark v.*
State of New York (142 N. Y. 101, 105) by an
unanimous court, and in *Ryan v. City of New York*
(177 N. Y. 271).

In *People v. Orange County R. C. Co.* (*supra*) the Chief Judge intimated that there was a distinction between the cases in which the State prosecuted the work itself and those in which it did so through the medium of an "independent contractor," but this distinction, as he himself afterwards pointed out in *People ex rel Cossey v. Grout* (179 N. Y. 417, 423), was completely swept away by the decision of this Court in *Atkin v. Kansas* (191 U. S. 207) a case to which we shall presently more fully refer; and that no such distinction exists is also shown by the *Ellis* case above referred to, and by the decision of the New York Court of Appeals in *People ex rel Williams E. & C. Co. v. Metz* (193 N. Y. 148) which followed and applied the *Atkin* case.

In *People v. Luddington Sons' Inc.* (73 Misc. [N. Y.] 363) the ALIEN provision was directly involved. The Court reviewed the cases at length and, in conclusion, said:

"No State can deprive any person of his right to acquire and hold property or do labor for others; but a State, like an individual, may determine whom *it* will employ in the construction of *its* public works and it is, like an individual, under no obligation to employ any class of laborers unless it desires so to do. The national government, while it may not pass a law that no Mongolians shall be employed in its boundaries, may decide *for itself* that no Mongolians shall be employed on *its* irrigation works for the reclamation of its arid land; and, while a State may not enact laws providing that eight hours shall constitute a day's work for any and all corporations, it may determine that, in the prosecution of all work *by and on behalf of the State*,

eight hours shall constitute a day's work, and that only in case of certain emergencies shall laborers be allowed to work for a longer time in any day.

"So it may not make it unlawful for all employers to employ unnaturalized foreigners, but it has the same right as an individual to refuse to employ them in the conduct of its own affairs. Conceding that a State has the same rights in conducting its business that an individual has, I cannot see that the State by an enactment of this law has exceeded its powers; and, if an individual or private corporation is not bound by any of the existing treaties to employ unnaturalized foreigners, I cannot see that the State is compelled so to do.

"I can conceive excellent reasons why, on works of certain character, it might be much preferable to employ persons who had resided in the country long enough to become familiar with its language and methods of labor; but that is hardly pertinent to the decision of the question at issue" [p. 376].

We now take up the question whether the State may make directions, such as those here involved, with respect to the construction of "public works" by its MUNICIPALITIES and by persons contracting with municipalities for the construction of such works. This brings us directly to a consideration of the subsidiary propositions to which we have heretofore referred [*ante*, p. 14], namely:

1. The relations existing between the State and its municipalities; and
2. The status of "municipal" contractors and their "employees".

In this connection we shall first consider the case of *Atkin v. Kansas* (191 U. S. 207),—which relates to both propositions.

Atkin v. Kansas, 191 U. S. 207.

That case involved the constitutionality of a law of Kansas, known as the 8-hour law, which provided that 8 hours should constitute a day's work for all laborers employed by or on behalf of the State or any of its municipalities, and which made it unlawful for any one *contracting* to do any public work of the state or municipality, etc., to require or permit any laborer to work longer than 8 hours per day. The defendant, a *contractor* with a *municipality*, who had been convicted of a violation of the statute, contended that the statute was in conflict with the 14th amendment of the U. S. Constitution. The Court said, *per Mr. JUSTICE HARLAN*:

"No question arises here as to the power of a State, consistently with the Federal Constitution, to make it a criminal offense for an employer in purely private work in which the public has no concern, to permit or to require his employes to perform daily labor in excess of a prescribed number of hours."

* * * * *

"As already stated, no such question is presented by the present record; for the work to which the complaint refers is that performed **on behalf of a municipal corporation, not private work for private parties.** Whether a similar statute, applied to laborers or employes in *purely private work*, would be constitutional, is a question of very large import, which we have no occasion now to determine or even to consider.

"Assuming that the statute has application only to labor or work performed by or on behalf of the State, **or by or on behalf of a municipal corporation,** the defendant contends that it is in conflict with the Fourteenth Amendment. He insists that the Amendment

guarantees to him the right to pursue any lawful calling, and to enter into all contracts that are proper, necessary or essential to the prosecution of such calling; and that the statute of Kansas unreasonably interferes with the exercise of that right, thereby denying to him the equal protection of the laws.

* * * * *

“‘If a statute,’ counsel observes, ‘such as the one under consideration is justifiable, should it not apply to all persons and to all vocations whatsoever? Why should such a law be limited to contractors with the State and its municipalities? * * * Why should the law allow a contractor to agree with a laborer to shovel dirt for ten hours a day in performance of a private contract, and make exactly the same act under similar conditions a misdemeanor when done in the performance of a contract for the construction of a public improvement? Why is the liberty with reference to contracting restricted in the one case and not in the other?’

“These questions—indeed, the entire argument of defendant’s counsel,—seem to attach too little consequence to the relation existing between a State and its municipal corporations. Such corporations are the creatures, mere political subdivisions, of the State for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the State. They are, in every essential sense, only auxiliaries of the State for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged, or altogether withdrawn at the will of the Legislature; the authority of the Legislature, when restricting or withdrawing

such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed. *Rogers v. Burlington*, 3 Wall. 654, 663; *United States v. Railroad Co.*, 17 Wall. 322, 328-329; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 525; *State Bank of Ohio v. Knoop*, 16 How. 369, 380; *Hill v. Memphis*, 134 U. S. 198, 203; *Barnett v. Denison*, 145 U. S. 135, 139; *Williams v. Eggleston*, 170 U. S. 304, 310.† In the case last cited we said that a 'municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the State for conducting the affairs of government, and as such it is subjected to the control of the Legislature.' It may be observed here that the decisions by the Supreme Court of Kansas are in substantial accord with these principles. That court, in the present case, approved what was said in *City of Clinton v. Cedar Rapids & Missouri River R. R. Co.*, 24 Iowa, 455, 475, in which the Supreme Court of Iowa said: 'Municipal corporations owe their origin to, and derive their powers and rights wholly from, the Legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the Legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations of the State, and the corporations could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the Legislature.* See also *In re Dal-*

†See also in support of the foregoing the following later cases: *Hunter v. Pittsburgh*, 207 U. S., 161, 178; *People ex rel. Williams E. & C. Co. v. Metz*, 193 N. Y., 146, 161.

*Quoted in *Ryan v. City of New York*, 177 N. Y. 271, 277.

ton, 61 Kansas, 257; *State ex rel. v. Lake Koen Co.*, 63 Kansas, 394; *State ex rel. v. Com'rs of Shawne Co.*, 28 Kansas, 431, 433; *Mayor &c. v. Groshon*, 30 Maryland, 436, 444.

"The improvement of the Boulevard in question was a work of which the State, if it had deemed it proper to do so, could have taken immediate charge by its own agents; for, it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the State invested one of its governmental agencies with power to care for it. Whether done by the State directly or by one of its instrumentalities, the work was of a *public not private*, character.

"If, then, the work upon which the defendant employed Reese was of a public character, it necessarily follows that the statute in question, in its application to those undertaking work for or on behalf of a municipal corporation of the State, does not infringe the personal liberty of any one. It may be that the State, in enacting the statute, intended to give its sanction to the view held by many, that, all things considered, the general welfare of employes, mechanics and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen and enable them the better to discharge the duties appertaining to citizenship. We have no occasion here to consider these questions or to determine upon which side is the sounder reason; for, whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the *power* of the

State to declare that no one undertaking work for it or for one of its municipal agencies, should permit or require an employe on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. **It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State. On the contrary, it belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities.** No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.

“If it be contended to be the right of every one to dispose of his labor upon such terms as he deems best—as undoubtedly it is—and that to make it a criminal offense for a contractor for public work to permit or require his employe to perform labor upon that work in excess of eight hours each day, is in derogation of the liberty both of employes and employer, it is sufficient to answer that **no employee is entitled of absolute right and as a part of his liberty, to perform labor for the State;**† and no contractor for public work can excuse a violation of his agreement with the State by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do.

“So, also, if it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor rests upon legislators, not upon the

†Quoted in *People ex rel. Williams E. & C. Co. v. Metz*, 193 N. Y. 148, 163. See also *Ryan v. City of New York*, 177 N. Y. 271, 277-278.

courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, *the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people*, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution. It cannot be affirmed of the statute of Kansas that it is plainly inconsistent with that instrument; indeed *its constitutionality is beyond all question.*

"Equally without any foundation upon which to rest is the proposition that the Kansas statute denied to the defendant [a contractor with a municipality] **or to his employe** the equal protection of the laws. The rule of conduct prescribed by it applies alike to all who contract to do work on behalf either of the State or of its municipal subdivisions, and alike to all employed to perform labor on such work.

"Some stress is laid on the fact, stipulated by the parties for the purposes of this case, that the work performed by defendant's employe is not dangerous to life, limb or health, and that daily labor on it for ten hours would not be injurious to him in any way. In the view we take of this case, such considerations are not controlling. We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the

State and its municipal agents acting by its authority, it is for the State to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regulations, infringe the personal rights of others; and that has not been done."

Atkin v. Kansas, 191 U. S., 207.

The principle of the *Atkin* case was adopted and applied by the New York Court of Appeals in *Ryan v. City of New York* (177 N. Y. 271), a case in which the "decision" in *People ex rel. Rogers v. Coler* (166 N. Y. 1)† [cited and relied upon by the defendant below] was, so far as its language might appear to be pertinent to the question involved in the case at bar, overruled and rendered of no further value as an authority in aid of the determination of the questions which are here presented. (See also *People ex rel. Cossey v. Grout*, 179 N. Y. 417; *People ex rel. Williams Eng. & Con. Co. v. Metz*, 193 N. Y. 148, 161-164.)

In the *Ryan* case (*supra*) the Court of Appeals independently reached the same conclusion as this Court in the *Atkin* case, and also quoted extensively from the opinion in that case in support of its decision. In the *Ryan* case the employment was directly with the city; there was no intermediate contractor. But that there is no distinction between a case where the city was the direct employer and that of a contractor is conceded even by the non-concurring judges (Opin. of O'Brien, J., 177 N. Y. 281), and is settled in this Court by the decision in the *Atkin* case.

†The decision has also been overthrown by State Constitutional Amendment.

The Court of Appeals again followed and applied the *Atkin* case in *People ex rel. Williams E. & C. Co. v. Metz* (193 N. Y. 148), in which it was held by a unanimous court that the *contractor* on a public work of the *municipality*—the construction of a *sewer*—was bound to comply with the provisions of the law respecting the payment of the prevailing rate of wages and the hours of labor, and that the law was constitutional.

People ex rel. Williams E. & C. Co., v. Metz,
193 N. Y. 148.

Other cases in which the same principle has been applied—that the State may dictate its employment policy respecting public works, whether constructed by the State itself, its municipalities or contractors, are:

Keefe v. People (Colo.), 8 L. R. A. (N. S.),
131 [construction of a sewer by a contractor with a municipality].

State v. Livingston Concrete B. & M. Co. v.
(Mont.) 87 Pac. 980.

Re Broad, 36 Wash. 449.

Re Dalton, 61 Kan. 257.

In *People ex rel. Williams Eng. & Con. Co. v. Metz* (193 N. Y. 148, 161) the Court said quoting from *Hunter v. Pittsburgh* (207 U. S. 161, 178):

“ ‘Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be intrusted to them. * * * The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the

absolute discretion of the State. * * * The State, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the State Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States' " [p. 161.]

In *Ryan v. City of New York* (177 N. Y. 271), the Court said:

"In the administration of the **affairs of those subdivisions**, as well as in those of the state at large, the **legislature is unrestrained** unless by express provisions of the Constitution. As expressed in *Rodgers' Case* (166 N. Y. 1, 29): '*The authority of the state is supreme in every part of it and in all of the public undertakings the state is the proprietor. For convenience of local administration the state has been divided into municipalities, in each of which there may be found local officers exercising a certain measure of authority, but in that which they do they are but the agents of the state, without power to do a single act beyond the boundary set by the state acting through its legislature.*' Thus all of these agencies and employees in the several municipalities are doing the work of the state, which is the sovereign and master."

N. B. The above quotation from the *Rodgers* case is taken from the *dissenting* opinion of

PARKER, CH. J., in that case; and it thus, in the *Ryan* case, received the approval of a majority of the Court of Appeals [PARKER, CH. J., HAIGHT, CULLEN and WERNER, JJ.,] and to that extent was recognized by that Court as a sustaining principle to be applied to legislation of this kind. The same principle was applied in *People ex rel. Williams E. & C. Co. v. Metz* (193 N. Y. 148). We refer to these New York decisions because, as we shall hereafter point out, the relations of a municipal corporation to the State, and the extent of its powers, is largely a question of local policy and local law.

EXPRESS STIPULATION IN THE CONTRACT UNNECESSARY.

It was claimed by the defendant that there was no stipulation in his contract with the city not to employ "aliens" on the work—and that, hence, he does not come within the purview of the statute. Such a claim is wholly untenable.

1. It was not necessary, so far as this case is concerned, that the provision of the statute should have been actually incorporated into or set forth in the contract. The parties to the contract were chargeable with knowledge of its provisions, and, if they are valid, they will be read into the contract by operation of law.

People ex rel. Rodgers v. Coler, 166 N. Y. 1.
Village of Medina v. Dingledine, 211 N. Y.
 24, 28.

In *People ex rel. Rodgers v. Coler* (166 N. Y. 1), the Court said, *per O'BRIEN, J.*:

“If the law is valid it governs the contract and the rights of the parties whether actually incorporated into the writing or not, since all contracts are assumed to be made with a view to existing laws on the subject.”

In *Village of Medina v. Dingledine* (211 N. Y. 24, 28), HISCOCK, J., said:

“Although the provisions of the labor law were not set forth in the contract, as required by the statute, the parties to such a contract were, of course, chargeable with knowledge of such provisions * * *.”

The defendant contracted to construct a public work for the city. He made the contract of his own free will. He did not have to undertake the work unless he saw fit to do so. He knew the law. At least he is presumed to have known it. The law prescribed that he should not employ aliens in the construction of that work and made the employment of such persons a misdemeanor. If he violated that provision he committed a misdemeanor—provided the law is a valid law (of which we submit there can be no question)—whether he stipulated in the contract to obey the law or not. This is not a suit for breach of contract. The defendant disobeyed the mandate of a penal statute and for that he is responsible (*Atkin v. Kansas, supra*; *Ellis v. United States*, 206 U. S. 246, 256).

2. In this connection it may be further said that the defendant, by undertaking the work knowing the conditions imposed by the statute, *waived* his general constitutional right. Conceding that as a private person he had the right to employ whomsoever he would in his private affairs, if he undertook to do work for the state or city he

was in the same position as one who procures a license from the state to do something which he had no inherent right to do independent of the license (*Bertholf v. O'Reilly*, 74 N. Y. 509, 517-518; *People v. Rosenheimer*, 209 N. Y. 115).

The State, or its agent, did not have to employ or contract with the defendant unless it saw fit to do so. It was a privilege conferred, not an inherent right; and if the defendant, knowing that the law prohibited him from employing aliens on the work, accepted the privilege knowing the conditions attached thereto, he waived the general constitutional right he might have as a purely private individual.

The State, we submit, had an undoubted right to refuse employment to "aliens" on "public works". The defendant as a private person pursuing his private concerns had a right to employ aliens to work for him if he saw fit to do so; and in that right the Constitution protects him. But if in undertaking to do *public* work for the city the State (the principal and master) exacted as a condition that he should not employ aliens, he could waive any general constitutional right, and did so by accepting the service or privilege knowing the conditions thereto attached by the statute.

. *People v. Rosenheimer*, 209 N. Y., 115.

Ex parte Kneidler, 243 Mo. 632.

Bertholf v. O'Reilly, 74 N. Y. 509, 517-518.

Ryan v. City of N. Y., 177 N. Y. 271, 279.

People ex rel. McLaughlin v. Board of Police Commrs., 174 N. Y. 450, 456.

Atkin v. Kansas, 191 U. S. 207.

In *Bertholf v. O'Reilly* (74 N. Y. 509, 517-518) the Court said:

“The licensee, by accepting a license and acquiring thereby a privilege from the State to engage in the traffic, a privilege confined to those who are licensees and withheld from all other citizens, takes it subject to such conditions as the Legislature may attach to its exercise. He consents to be bound by the conditions when he accepts the license, and the State is the sole judge of the reasonableness of the conditions imposed. And the power of the Legislature, as a part of the excise system, to impose the liabilities, imposed by the act in question, upon licensed dealers, as a condition of granting a license, cannot, we think, be questioned. A party cannot object, upon constitutional grounds, to a liability which he has voluntarily assumed, in consideration of a benefit conferred, and one may renounce even a constitutional provision made for his own benefit” [pp. 517, 518].

See also:

Crowley v. Christensen, 137 U. S. 86, 91.

In *People v. Rosenheimer* (209 N. Y. 115) there was involved the constitutionality of a statute which required any person operating a motor vehicle, who knowing that injury had been caused to a person or property “*due to the culpability of the said operator, or to accident*”, to report his name and address, &c., at the police station, &c., and made a failure to do so a felony.

The defendant contended that the statute was unconstitutional, in that it compelled him to be a witness against himself. The Court, however, held that as a person had no inherent right to op-

erate a motor vehicle on the public highway, and required a license from, or the consent of, the State to do so, the State might exact such a condition in granting him a license; and that the defendant, by accepting the license, with knowledge of the law, *waived* the constitutional privilege.

People *v. Rosenheimer*, 209 N. Y. 115.

Cf. *Atkin v. Kansas*, 191 U. S. 207.

Ryan v. City of New York, 177 N. Y. 271.

Peo. ex rel. Williams E. & C. Co. v. Metz,
193 N. Y. 148.

A somewhat analogous situation was involved in *Wilson v. United States* (221 U. S. 361), where it was held that the privilege against compulsory self-incrimination did not operate to warrant a person refusing to produce *public* books or documents in his possession, but only would relieve him from producing those of a *private* nature—his private papers.

3. The defendant claimed that even if the State could prohibit his employing aliens in the performance of the work under the contract, it had not the right to make his doing so a misdemeanor—a crime.

This contention is untenable. It involves a confusion of ideas. When the State made a contract it did not give up its power to make a law—its sovereignty. It could make a breach of the contract—a disobedience of its mandate—criminal.

Ellis v. United States, 206 U. S., 246, 255,
256.

United States v. Reynolds, 235 U. S. 133,
150 [Opin. of Mr. Justice Holmes].

Atkin v. Kansas, 191 U. S. 207.

People *ex rel.* Williams E. & C. Co. *v.* Metz,
193 N. Y. 148.

People *v.* Orange Co. R. Co., 175 N. Y.
84.

As a principal it contracts; as a sovereign it may punish a disobedience of its mandates (*Ellis v. United States*, 206 U. S. 246, 255, 256).

Indeed, it is fundamentally but an application of the principle recognized at the common law that matters—for example neglect of a duty—which, as between the master and servant would be actionable, may be, as between the King and the subject, indictable.

II.—POLICE POWER IN THE MORE GENERALLY ACCEPTED SENSE.

The cases involving the validity of those provisions of the labor laws requiring the payment of the prevailing rate of wages to workmen on public works, and restricting the hours of labor on such works did not present any question of "*Police Power*."†

But the provision prohibiting the employment of "aliens" on public works does present such a question; and we contend that such a provision is a valid exercise of the "Police power"—and this even if the "contractor" be regarded as occupying the position of a private person as related to his workmen, with respect to the performance of the work in question.

We are not concerned here with the question whether a general prohibition against the em-

†We use the term "Police power" here in the sense in which we have heretofore defined it—that is in its restrictive aspect.

ployment of aliens by contractors with the State or its municipalities is a valid exercise of the police power. The only question we are concerned with here is whether such a restriction with reference to *public works*, such, for example, as our sewer systems, our water works, our highways and the like, is a valid exercise thereof. The prohibition of the statute concerns not municipal or State contracts generally but only those affecting "**the construction of public works.**"

Let it be assumed, as a general proposition, that an employer of labor has the right to employ whomsoever he will in the conduct of his business enterprises—that he may employ aliens as well as citizens if he chooses so to do, and that this right is part of the "liberty" or "freedom of contract" secured to him by the fundamental law.

It is equally true that the "freedom of contract" of the individual may be limited and subjected to many restraints, in order to promote the public welfare of the State and its people. This is brought about by the State's Police power.

Frisbie v. United States, 157 U. S. 160, 165.

Allgeyer v. Louisiana, 165 U. S. 578, 591.

Williams v. Fears, 179 U. S. 270, 274.

Holden v. Hardy, 169 U. S. 366.

Muller v. Oregon, 208 U. S. 412, 421.

McLean v. Arkansas, 211 U. S. 539.

Chicago B. & Q. R. Co. v. McGuire, 219 U. S. 549, 566, 567.

Erie R. R. Co. v. Williams, 233 U. S. 685, 699.

Whether the restrictive regulations imposed constitute an undue infringement of private rights

is for the legislature to determine in the first instance. Every presumption is in favor of the validity of its acts. The judicial review of its judgment is limited. The burden is upon him who attacks the validity of an act of legislation to show that it is beyond the *power* of the law-making body to enact it. That burden is not sustained by merely declaring a liberty of contract, a right to labor, or a right to choose one's own servants without let or hindrance. "It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that the public welfare is *not* subserved by the legislation." The judgment of the legislature will not be reviewed unless unmistakably and palpably in excess of legislative power. "The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance."

Erie R. R. Co. v. Williams, 233 U. S. 685, 699, 704.

Chicago B. & Q. R. Co. v. McGuire, 219 U. S. 549, 565, 567.

McLean v. Arkansas, 211 U. S. 539, 547.

Price v. Illinois, 238 U. S. 446, 453.

The Police power has a "far-reaching scope". "It is not subject to definite limitations but is co-extensive with the necessities of the case and the safeguards of public interest". "It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. * * * It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government."

Sligh v. Kirkwood, 237 U. S. 52, 59.

In *People ex rel. Nechamcus v. Warden* (144 N. Y. 529), Gray, J., spoke of it as

"designed for the protection of the public and to secure it against **some danger real or anticipated**, from a state of things, which modifications in our social or commercial life have brought about" [p. 535].

"It is a power essentially to be conceded to the state in the interest of and for the welfare of its citizens."

People v. Ewer, 141 N. Y. 129, 132.

That this power is reserved by the States to the fullest extent cannot be disputed (*Barbier v. Connolly*, 113 U. S. 27, 31) [*vid. ante*, pp. 18-20].

The prohibition of the employment of aliens by contractors in "the construction of public works" has a direct tendency to promote (1) the material safety and welfare of the State and (2) the economic and industrial welfare of its citizens.

1. Assume the enactment of a law prohibiting the employment of aliens upon our public reservoirs, highways and systems of transportation; and assume, further, that such a statute was enacted at a time when we were fearful of an armed conflict with all the nations of Europe. Who would doubt the wisdom of such a statute, and who would doubt that such a statute was intended for the protection of public life, health, safety and general welfare? Aliens who happen to be subjects of the nations with whom a war is anticipated, but not begun, could not be discharged from their employment upon our public reservoirs, if the contention of plaintiff-in-error is true; and they might be in a position to destroy

the water supply of our municipalities if such an enactment were invalid. Is it necessary to wait until the actual declaration of a war before a State has the authority to enact such a statute? Over and over again, the courts have declared that preventive legislation is by far the more efficacious remedy to guard against existing or anticipated evils; and in modern times much of the legislation placed upon the statute books has been of that character.

Matters connected with the construction of sewers and all matters concerned, like sewer construction, with the public health are not the functions of the municipality as a corporation, but they are the functions of the State and they involve the exercising of the governmental powers of the State, intrusted for actual carrying out to its political subdivision—the particular municipality. In this respect, matters connected with the construction and maintenance of sewers bear a perfect analogy to matters connected with the organization and conduct of the police and fire departments and the like.

Suppose the charter of the City of New York provided that the City of New York, instead of having a police department of its own, should contract with a person or a corporation for the performance of guard and police duty by him or it in the City of New York, and that this person or corporation was required to furnish a certain number of police or watchmen. Can it be said that the State would be restricted, in a matter of that kind, from enacting legislation to the effect that the persons so employed by such a contractor should be citizens of the United States. If the

State is restricted from enacting a statute of that kind, where it contracts for police service, then it practically would be required, in the alternative of its being unable to officially manage municipal police forces, to place itself at the mercy, at times, of aliens, where such alien employes could be hired more cheaply than native policemen.

The distinction between persons employed on a matter affecting public life and health, like a sewer, and persons employed in what amounts virtually to the work of soldiers or policemen, in the direct protection of life and property, probably exists only in the form of activity and not in actual principle. What is at stake here is not simply what the court may decide as to this specific statute. If the court decides that this statute is unconstitutional, it does so because of the principle that the State cannot, in the exercise of its police powers, restrict the employment by contractors operating on matters connected with the local exercise of police powers; and once such a principle obtains the sanction of legal decision, its possible application constitutes a serious menace and an undermining of the very foundations upon which the sovereignty of an independent state is based.

So far as the exercise of *police power* is concerned, no distinction exists between public works connected with the governmental (sovereign) functions of a municipality and those connected with the purely local functions of a municipality. The important consideration is that *public property is affected*. The property of a municipality used for only local purposes is public property just as much as is municipal property used for

purely governmental (sovereign) functions. The state's right to protect *that* property is unquestionably a right arising under its police power. It amounts in this instance virtually to a right to preserve itself.

A State is a body politic, composed of its *citizens* (*United States v. Cruikshank*, 92 U. S. 542, 549). And as was said by this Court in *Knoxville Iron Co. v. Harbison* (183 U. S., 13):

“The first right of a State, as of a man, is self-protection and with the State that right involves the universally acknowledged power and duty to enact and enforce all such laws not in plain conflict with some provision of the State or Federal Constitution as may rightly be deemed necessary or expedient for the safety, health, morals, comfort and welfare of its people” [p. 20].

In determining whether the “alien” provision of the Labor Law is constitutional, we are concerned with a question of power to effect *any* purpose rather than with the specific purpose for which speculation might conclude that the statute was enacted. If that portion of the statute under consideration were declared unconstitutional because its purpose is believed to be an economic discrimination between Americans and aliens, then the court must say that the legislature is powerless to enact such legislation. If the purpose of a later similar provision is said to be the protection of public property, and the statute then declared constitutional for that reason, the court assumes to determine *not* the question of legislative *power* but the question of legislative *motive*.

Once it is determined, however, that the legislature has the *power* to enact certain specific legislation, the courts have held that they are precluded from inquiring into *motives* and *specific purposes*, but must sustain the legislation as constitutional if it is authorized at all. (*Ellis v. United States*, 206 U. S. 246, 256.)

The Courts "must assume that the legislature acts according to its judgment for the best interests of the State. A wrong intent cannot be imputed to it" (*Florida Central R. R. v. Reynolds*, 183 U. S. 471, 480). They "are not at liberty to inquire into the motives of the legislature"; they can "only examine into its *power* under the Constitution" (*Ex parte McArdle*, 7 Wall. 506, 514) [*Cooley's Const. Lin.*, 7th Ed. 257]. They have nothing to do with the "policy, wisdom, justice or fairness" of the act, "those questions are for the consideration of those to whom the State has entrusted its legislative power, and their determination of them is not subject to review or criticism by this Court" (*Hunter v. Pittsburgh*, 207 U. S. 161, 176) [*United States v. First Nat. Bank*, 234 U. S. 245, 260]. And it is not necessary that the legislature should declare on the face of a statute the policy or purpose for which it was enacted (*People v. West*, 106 N. Y. 293, 297).

It may be said by some of the opponents of this law that the foregoing consideration is far-fetched.* They also lose sight of the fact that the constitutionality of a law depends upon legislative *power* alone, not upon legislative *motive*. There is too much tendency on the part of those who question the validity of statutes and who ask the

*The circumstances which led to the request by the United States government for the recall of the ambassador of a foreign power in a recent instance go far to combat any such suggestion.

Courts to nullify and strike down laws which have received the sanction of the people's representatives, to lose sight of the question of *power*, and to assail the laws because their policy does not appeal to them, or because they question the motives which underlay their enactment. The question of constitutionality is one of *power*, nothing else. Motive is *not* involved.

Ellis *v.* United States, 206 U. S. 246, 256.
Hunter *v.* Pittsburgh, 207 U. S. 161.

In *Mo. P. Ry. Co. v. Humes*, 115 U. S. 512, 520, MR. JUSTICE FIELD said:

“If the laws enacted by a state be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law.”

It is our contention, that since work on public property (“public works” generally, as the term is used in the statute) is as much a matter of public interest when the work is done under contractors as when it is done directly under public officials, municipal or state, and since it is a matter of public and not of private interest, that the State, in the proper safeguarding of its property and the property of its subdivisions, may say who shall be admitted to such property,

that it has the power to enact legislation that shall keep from it those who might injure it or retard progress in its building or development, and to that end may prohibit the employment on such property, by itself, its subdivisions or contractors, of any class of persons whom it regards as even prospectively inimical to or even unmindful of its best interests.

2. But apart from those considerations, and lying at the bottom of this question, may be said to be broad economic problems, the duty of solving which lies with the people, acting through their representatives in the Legislature.

The police power

"is a power essentially to be conceded to the state in the interest of and for the welfare of its citizens."

People v. Ewer, 141 N. Y. 129, 132.

It is a power

"which will be, and should be, put forth as an expression of the popular conception of the necessities of social and economic conditions."

Bloomfield v. State, 86 Ohio St. 253.

Cf. *People ex rel. Nechamcus v. Warden*, 144 N. Y. 529, 535, *supra*; *Noble St. Bank v. Haskell*, 219 U. S. 104, 111.

When thousands of our citizens are out of work, is it not the duty as well as the right of the Legislature to bar to aliens the doors to *public* employment upon the *public* work of the State, and to reserve, for the welfare and prosperity of *its own*

people, the right to labor upon its public works? Are the aliens, who are crowding through our ports to be given employment upon public works to the detriment of our own citizens?

SCOTT, J., in the Appellate Division, quoted the words of O'BRIEN, J., in *People ex rel. Rodgers v. Coler*, 166 N. Y., 1, as follows:

"If the *policy* indicated in the statute now under consideration had been formulated and carried into operation half a century earlier, it may be that the growth and progress of the State would not be the subject of so much pride, or as gratifying to all the people as it is now."

But are we to judge the economic needs of the present day by the situation existing fifty years ago? And, was it due to the fact that aliens remained such that the State advanced in wealth and prosperity?

Questions of *policy* are for the Legislature to decide. They have decided them. They have voiced the sentiments of the people of the State of New York in this statutory enactment; and,

"If the legislation retards public improvements or increases municipal debts, or does not work well in other respects, there is ample room for public sentiment to act through the chosen representatives of the people."

People ex rel. Williams Eng. & Con. Co. v. Metz, 193 N. Y. 148, 159.

The legislature could take notice of existing labor conditions and the unemployment of its people. It is presumed to have done so.

To use the words of this Court:

“The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power.”

McLean v. Arkansas, 211 U. S. 539, 546.

Williams v. Arkansas, 217 U. S. 79, 88.

If any justification of the wisdom of the statute, viewed as an economic measure, were needed it may readily be found in present day conditions—for New York today is the gravitating point for the hordes of the unemployed masses from every corner of this country, especially from those localities where mines and mills, at which *aliens* are mainly employed, are either entirely closed down or are being operated at greatly reduced capacity.

The legislature has the conceded right, by virtue of the police power, vested in the state as the sovereign, to pass laws in furtherance of the *general welfare of its citizens*. This power permits of any legislation that will insure to the citizens of the state employment, particularly in periods of distress. When municipal authorities are engaged in “speeding up” work on public contracts for the purpose of relieving distress created by general and wide spread unemployment, its very purpose is defeated when contractors on these works, in which the state is the ultimate proprietor, can employ aliens to the exclusion of citizens. In other words, unless there is such a statute as

the one in question, the details and operation of which are for the present immaterial, any such efforts as those now being made by our municipal authorities must necessarily be frustrated. The state should be in a position, under such circumstances, to engage in such activities in a period of general depression, for the benefit of its citizens. If it cannot legislate to the extent of excluding aliens from employment on its public works, it is powerless in a cosmopolitan city like New York, for example, to be of any assistance to its own citizens, when that assistance is most needed.

It may be noted that, almost simultaneously, with the passage of the laws prohibiting the employment of aliens in the construction of public works, the question of alien immigration, and its effect on American economic and industrial life, was receiving the attention of the National government (See Presidents' messages, Harrison For. Rel. 1892, XXXI; Cleveland 1895, For. Rel. I, XXX; Roosevelt For. Rel. 1901, XX).

While the question of alien immigration is wholly committed to the National government (Chinese Exclusion Cases, 130 U. S. 609) the status of the aliens and the effect of their presence, after immigration, in large numbers on the economic and industrial life of the States is a problem which they must solve for themselves, and with which they are empowered to deal and to solve in whatever manner may to them seem best—subject, of course, to the limitations placed upon their powers by the Federal Constitution, and the laws and treaties of the United States *made in pursuance of and in conformity therewith* (*vid.* Keller v. United States, 213 U. S. 138).

On the same principle that the National government may exclude aliens for the material and economic protection of its people (Moore's Int. Dig., Vol. 4, §561) we submit the states may bar them from employment on their "public works".

Report of Mr. Foster, Sec. of State to the President, Jan. 7th, 1893. S. Exc. Doc. 25
—Moore Int. Dig. Vol. 4, §561, pp. 153-158 [and authorities there collated].

Calvo, 4th Ed. I, §208.

Phillimore Int. Law, 2nd Ed., §ccxi.

Wheaton El. Int. Law, Pt. II, Chap. I, §2.

Nishimura Ekiu v. United States, 142 U. S. 651, 659.

While the state may not pass a law prohibiting aliens from earning their livelihood by following a lawful occupation; and while it may not pass a law prohibiting private persons from employing aliens in the conduct of their *private* business, it may, we submit, refuse to employ them itself, and may prohibit contractors on its *public* works from employing them. And this, not only by virtue of its "contractual" power, but by virtue of its police power put forth to promote the welfare and prosperity of its own people—their material and their economic welfare.

There is no invalid classification.

It must be conceded that the State has power to classify without violating the equality clause of the 14th Amendment. And this Court has frequently said that this power must have a "wide range of discretion" (*Mallinckrodt Works v. St. Louis*, 238 U. S. 41, 56). True, it must have "a

just relation to the legislative object in view"; but every reasonable intendment is in favor of the validity of the legislation (*Id.*, p. 55). "Classification must be accommodated to the problems of legislation" (*Int. Harv. Co. v. Missouri*, 234 U. S. 199, 212) and to authorize a judicial review of it it must be "palpably arbitrary" (*Id.*, p. 214). It cannot be disturbed by the courts "unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched."

Int. Harvester Co. v. Missouri, 234 U. S. 199, 214.

Williams v. Arkansas, 217 U. S. 79, 90.

Barrett v. Indiana, 229 U. S. 26, 30.

Before it can be condemned it must appear to be "palpably arbitrary."

Louisville & N. R. R. v. Melton, 218 U. S. 36, 55.

That alienage may form a valid basis for classification is shown by the decision in

Patsone v. Pennsylvania, 232 U. S. 138,
[*vid. post*, pp. 79-81.]

"Allen" Cases.

In *Commonwealth v. Hana* (195 Mass. 262) the Supreme Court of Massachusetts sustained the validity of a provision of a statute which prohibited the issuance of peddlers' licenses to persons not citizens of the United States or who had not declared their intention of becoming citizens, and held that it was within the legislative power to

pass such a law. The Court considered the matter at great length with reference to the 14th Amendment, conceded that its provisions applied to aliens as well as citizens, and stated that a statute arbitrarily forbidding aliens to engage in ordinary kinds of business to earn their living would be unconstitutional and void [citing *Yick Wo v. Hopkins*, 118 U. S. 356 and other cases]. It referred to the case of *State v. Montgomery* (94 Maine, 192) which held that a statute forbidding the issuance of peddlers' licenses to aliens was void, and said:

"Under § 19, no one can obtain a license unless he is, or has declared his intention to become a citizen of the United States. It is contended that this provision is in violation of the Fourteenth Amendment to the Constitution of the United States which provides that no States shall 'deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' It is decided that this provision applies to aliens as well, as to citizens of the United States, and it is clear that a statute arbitrarily forbidding aliens to engage in ordinary kinds of business to earn their living would be unconstitutional and void. *Yick Wo v. Hopkins*, 118 U. S. 356. *In re Ar Chong*, 2 Fed. Rep. 733. *In re Lee Sing*, 43 Fed. Rep. 359. *Pearson v. Portland*, 69 Maine, 278. Accordingly, it was held in an elaborate opinion in *State v. Montgomery*, 94 Maine, 192, that a statute for the licensing of hawkers and peddlers in that State was unconstitutional and wholly void, because of a discrimination between aliens and citizens, like that in our statute. See also *State v. Mitchell*, 97 Maine, 66. There is, however, an important question which was not much discussed in that case,

Whether the Legislature, in the exercise of the police power, could discover a reason for withholding peddlers' licenses from aliens. The business of peddling furnishes such opportunities for the practice of fraud that it is a proper subject for legislative regulation. That such regulation has been practiced from early times, both in Europe and America, is shown at length by Mr. Justice Gray in *Emert v. Missouri*, 156 U. S. 296. The requirement of R. L. c. 65, § 19, that before receiving a license the applicant shall file a certificate from the mayor of a city or the majority of the selectmen of a town that to the best of his or their knowledge and belief he is of good repute for morals and integrity, is a reasonable regulation for the protection of the public. If, in the same interest, the Legislature deems it important that licenses shall be granted *only to citizens of the United States*, or to those who have declared their intention to become citizens, it can hardly be said that they have exceeded their constitutional right in passing a law to that effect. Upon a similar question in reference to the granting of licenses to sell intoxicating liquors, decided in *Trageser v. Gray*, 73 Md. 250, 254, 255, 257, the court used this language: "It was thought proper to confine the license to citizens of the United States, of temperate habits and good moral character. The privilege is very liable to be abused, and abuses would produce great public detriment. It therefore seemed wise to the Legislature to confer it only on those who, being natives of the country, might reasonably be supposed to have a regard for its welfare; or who, not being natives, had, as required by the naturalization law, proven by credible testimony before a court of justice, that they were attached to the principles of the Constitution of the United States, and were well disposed to their good order and happiness. It was certainly *the function of*

the law-making department to exercise its judgment on this question, and this court has no right to criticize its conclusion.' The opinion then goes on to say that the right so to legislate is within the police power reserved to the States, and after a full discussion, to declare that it is not at variance with the Fourteenth Amendment to the Constitution of the United States. The same reasoning is equally applicable to the granting of licenses to hawkers and pedlers. Indeed, the nature of their business is such that their possession of a domicile and citizenship in this country might be important to those seeking remedies for wrongs done in their business. Notwithstanding the decision in *State v. Montgomery*, 94 Maine, 192, we are of opinion that the Legislature, in the exercise of the police power, might make this requirement as to the qualification of applicants for a pedler's license."

It is important to note that the Supreme Court of Massachusetts refused to follow the decision in *State v. Montgomery* (94 Maine, 192) and approved the decision in *Trageser v. Gray* (73 Md. 250); and that both the Massachusetts and Maryland cases were cited by this Court in the recent case of:

***Patsone v. Pennsylvania*, 232 U. S. 138.**

in which this Court held that "alienage" may *per se* constitute a valid basis of classification and that a law of Pennsylvania which specifically discriminated against "aliens" as a class was not in conflict with the "equal rights" clause of the 14th Amendment.

We shall presently consider this *Patsone* case; but we might say in passing that the "aliens"

would probably consider it less of an unconstitutional discrimination that a State, in declaring its public policy, should bar them from employment on its "public works" or those of its municipalities—in order to benefit and give employment to its own citizens (who are its body politic and the ultimate proprietors in their aggregate capacity of those very works which their money, their pride and their toil has created)—than to refuse them peddlers' or liquorsellers' licenses on the ground that, by reason of the fact that they are "aliens," there was a conclusive presumption that they were potential cheats, one and all—the underlying reason assigned for the validity of the discrimination in the cases referred to.

If a State has the right to refuse to grant to an "*alien*," simply because he is an "*alien*," a license to engage in a pursuit in which he is not entitled to engage without the State's consent, why can it not refuse to give him employment on its "public works"? A man has no inherent right to work or perform labor *for the State* or on its public undertakings any more than he has to hawk goods or sell liquor, to practice law or medicine or to serve on a jury (*Crowley v. Christensen*, 137 U. S. 86, 91; *Atkin v. Kansas*, 191 U. S. 207, 223; *People ex rel. Williams E. & C. Co. v. Metz*, 193 N. Y. 148, 163).

In *Patson v. Pennsylvania* (232 U. S. 138) a law of Pennsylvania, passed for the purpose of protecting game birds, prohibited the carrying and possession of shotguns and rifles by aliens. It was specifically directed against *aliens* as a class, and although assailed in this Court, its validity was upheld in an opinion written by MR. JUSTICE HOLMES.

The learned Justice stated that the objection under the 14th Amendment was two-fold—unjustifiably depriving the alien of property, and discrimination against such aliens as a class. He pointed out that the former really depended upon the latter since, if the discrimination was warranted, the means of making it effective might also be adopted. The Court *sustained the right of the state to discriminate against aliens as a class*, pointing out that the state might preserve wild game “for its own citizens if it pleases” [232 U. S., pp. 145-146].

Surely, if a state has the right to confine the hunting and taking of game to “*its own citizens*”, it has equally the right to bar aliens from employment on its “public works”; and its legislation in that respect is not violative of the “equality” guaranteed by the 14th Amendment.

The “public works” of the state—and this includes those of the municipalities and other subdivisions of the state—belonging, as they do, to the people of the state in their collective and sovereign capacity (the municipality merely holding them as trustee for the people) [Ryan v. City of New York, *supra*] the Legislature, as the representative of the sovereign authority, invested with the sovereign power, except where it is *expressly* restricted, has the right to determine all matters connected therewith; and this right is not affected or in any wise impaired by the qualified ownership in the municipality, which, as we have said, is merely in the nature of a trusteeship for the real and ultimate owners—the people of the state in their collective and sovereign capacity.

Geer v. Connecticut, 161 U. S., 519, 529, 530, 533.

Patsone v. Pennsylvania, 232 U. S. 138.

In *McCready v. Virginia* (94 U. S. 391) the court held that the State of Virginia could lawfully restrict to "*its own citizens*" the privilege of planting oysters in the streams of that state, the soil under which was owned by it; and that legislation to that effect was not violative of the provision of the Federal Constitution which provided that the citizens of each state were "entitled to all privileges and immunities of citizens in the several states." The decision was put on the ground that title and ownership was in the People of the state in their united and collective capacity, and that the state had a right to appropriate its tide waters and their beds to be used by "*its people*," saying:

"Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the state thus acquire comes not from their citizenship alone, but from *their citizenship and property combined*. It is, in fact, a property right, and not a mere privilege or immunity of citizenship.

.

We think we may safely hold that the citizens of one state are not invested by this clause of the Constitution with any interest in the common property of the citizens of another state" [p. 395].

The Court then went on to point out that the people of Virginia owned the property by virtue of their *special citizenship* of that state, and this special citizenship, combined as it was with ownership gave them the right to restrict its use and confine its advantages to themselves alone.

To the same effect:

People *v.* Lowndes, 130 N. Y. 455, 462.
Comm. *v.* Hilton, 174 Mass. 29.

In *Hudson Co. Water Co. v. McCarter* (209 U. S. 349) it was held that a State had a property in its waters and might prohibit them from being diverted beyond its boundaries, and this notwithstanding that the Water Company had entered into a contract to pipe water into an adjoining State. The prohibition was within its Constitutional powers.

In *Comm. v. Patson* (231 Pa. St., 46), the Court said:

"We legislate primarily for *our own citizens* in granting the special privileges that are independent of our inherent rights. The alien is prohibited from doing many things to which a natural-born or a naturalized citizen is entitled. He cannot exercise any political rights whatever nor be compelled to fill any elective or appointive office; he is not qualified to serve as a juror; or to receive a license to sell liquor, hawk or peddle" [p. 51].

The Court also points out that it is not only the right but the bounden duty of the State to advance the safety, happiness and prosperity of "*its people*", and to provide for its general welfare "by any and every act of legislation which it may deem conducive to those ends" [p. 52].

The Court further said:

"This defendant is not a citizen of the United States nor of this Commonwealth. While he is within our jurisdiction he is entitled to the equal protection of the law, sub-

ject to the limitations of the class of which he is a member" [p. 53].

The class was "aliens."

It would be superfluous to call attention to the numerous statutory provisions prohibiting aliens from holding land in various states of the United States. Notwithstanding that the equality clause of the Fourteenth Amendment applies to all "persons" within the territory or jurisdiction of a state, it has never been supposed that the equality guaranteed by that amendment was violated by such provisions. It is a question of state "policy."

Blythe v. Hinckley, 180 U. S. 333, 341.

FREUND in his work on Police Power (§ 706) says

"That with regard to aliens equal protection means equal justice and equal security rather than perfect equality follows from the well-established principle that the states may in accordance with the common law deny to aliens the right to own land, unless such right is stipulated by treaty."

To these cases might be added many others. For example:

It has been held that alienage operates as a disqualification for public office. (*Moore's Int. Dig.*, Vol. 4, § 541, citing *Drew v. Rogers*, 34 Pac. 1081, and *State v. Van Beck*, 54 N. W. 525, see N. Y. Pub. Off. Law).

Opinion of Justices, 122 Mass. 594.
Scott v. Strobach, 49 Ala. 477.

It may also disqualify for service on a jury (*Kohl v. Lehlback*, 160 U. S. 293; *Comm. v. Pat-sone*, 231 Pa. St. 46, 51).

A state has the right to debar aliens from holding stock in its corporation or to admit them to that privilege on such terms as it may prescribe (*State v. Travelers Ins. Co.*, 70 Conn. 590, 600).

A state may require citizenship as a condition precedent for admission to the bar (*In re O'Neill*, 90 N. Y. 584; see also cases in note 11 L. R. A. N. S. 799-800).

It is also a common requirement that in order to practice medicine, persons must be citizens of the United States, and no one has ever thought of disputing the power of the state to so declare—although the question of citizenship might certainly be regarded as somewhat remote from a person's general qualifications to treat disease.

In *Bloomfield v. State* (86 Ohio St. 253; 41 L. R. A., N. S. 726) the Court said, in sustaining a provision of a law which prohibited the granting of licenses to **aliens** to engage in the liquor business, notwithstanding that its manifest and sole purpose was to exclude certain classes of persons from the business—among others, **aliens**:

“It is also seriously urged that the law under examination is invalid because under it an alien cannot engage in the business referred to, and that this is in contravention of the 14th Amendment to Constitution of the United States. The case of *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, it is insisted, rules legislation such as involved here. In that case an ordinance of the city of San Francisco provided that it

should be unlawful for any person to engage in the laundry business without first obtaining consent of the board of supervisors. The court held that the 14th Amendment of Constitution of United States applies as well to aliens as to citizens of the United States, and that a law which in its operation arbitrarily forbids aliens to engage in ordinary kinds of business to earn a living was unconstitutional and void. In that case the exclusion was purely arbitrary and on account of race hatred. There was no pretense that the discrimination was made in the exercise of police power, which was justified by the peculiar character of the business.

"In the *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394, it was held that the State of Louisiana, in the exercise of its police power, might lawfully grant to a company for a specific term the exclusive privilege of maintaining slaughter-houses in a certain defined district, including the City of New Orleans. It was recognized that, while the business of a butcher is of great value and necessity, it is likely to endanger public health under some circumstances, and was subject to regulation. The state is necessarily invested with that which is called the police power, and which will be, and should be, put forth as an expression of **the popular conception of the necessities of social and economic conditions.** Under it may be done, and should be done, that which will best secure the peace, morals, health, and safety of the community. The Supreme Court of the United States has forcibly stated the duty of upholding state police regulations when enacted in good faith. *Noble, State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L. R. A. (N. S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912 A, 487; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

"It is not doubted that the state may classify persons and objects for the purpose of legislation, if the classification is based on proper and justifiable distinctions, considering the purpose of the law. The 14th Amendment was not designed to prevent all exercise of judgment by a state legislature of what the interests of the state require, nor to compel it to run all of its laws in the channels of general legislation. *Bachtel v. Wilson*, 204 U. S. 36, 51 L. ed. 357, 27 Sup. Ct. Rep. 243; *St. John v. New York*, 201 U. S. 633, 50 L. ed. 896, 26 Sup. Ct. Rep. 554, 5 Ann. Cas. 909. In *Brannon on 14th Amendment* it is said at page 324: The Amendment, 'permits special legislation in all its varieties. *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 1209, 8 Sup. Ct. Rep. 1176; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570. In other words, the state may distinguish, select, and classify objects of legislation, and necessarily this power must have a wide range of discretion. * * * Clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our government, might be obnoxious to the Constitution."

"In *People ex rel. Einsfeld v. Murray*, 149 N. Y. 367, 32 L. R. A. 344, 44 N. E. 146, the validity of a liquor tax statute (somewhat similar to the one involved here) was attacked, one of the grounds being that it was contrary to the 14th Amendment to the Constitution of the United States, but the court sustained the law, however, without giving special notice to that objection. In *Com. v. Hana*, 195 Mass. 262, 11 L. R. A. (N. S.) 799, 122 Am. St. Rep. 251, 81 N. E. 149, 11 Ann. Cas. 514, it was held that a requirement that a license as hawker and peddler shall be granted *only to a person who is, or has declared his intention to become, a citizen*

of the United States, is constitutional and a reasonable exercise of the police power. The court says: 'It is clear that a statute arbitrarily forbidding aliens to engage in ordinary kinds of business to earn their living would be unconstitutional and void. * * * The business of peddling furnishes such opportunities for the practice of fraud that it is a proper subject for legislative regulation. * * * If, in the same interest, the legislature deems it important that licenses shall be granted only to citizens of the United States, * * * it can hardly be said that they have exceeded their constitutional right in passing a law to that effect.' In *Trageser v. Gray*, 73 Md. 250, 9 L. R. A. 780, 25 Am. St. Rep. 587, 20 Atl. 905, the law in question invested a board with power of granting licenses to sell liquors by retail only to *citizens of the United States* of temperate habits and good moral character. The court held the law to be a valid exercise of the police power, and not repugnant to the 14th Amendment of the Constitution of United States. Other cases in which these principles are declared are *Blair v. Kilpatrick*, 40 Ind. 312; *Templar v. State Examiners*, 131 Mich. 258, 100 Am. St. Rep. 610, 90 N. W. 1058.

"We do not think the statutes of Ohio and of other states which have barred aliens from the liquor traffic in the manner stated have arisen from a spirit of race hatred or inhospitality, or a purpose to deny the equal protection of our laws or equal opportunity under our institutions."

A statute might be unconstitutional and void which arbitrarily prevented "aliens" from following on their own account or in working for *private persons*, the ordinary occupations of life. But a statute of a state which prohibits their employment on "public works" stands on the same footing as those which prohibit their engaging in

businesses to carry on which a license from the state, granted by itself or through one of its subordinate agencies acting for it, is required.

The case of *Yick Wo v. Hopkins* (118 U. S. 369), relied upon by the Court below, is not in point. The real point decided there was that the action of officials, who, in administering the law, arbitrarily discriminated against *a particular nationality*, actuated by a spirit of hatred and prejudice against persons of that nationality, amounted to an arbitrary discrimination and a denial of the "equal protection" guaranteed by the Constitution (*Quong Wing v. Kirkendall*, 223 U. S. 59, 63).

The *Patsons* case, and the other cases we have cited, establish, we submit, the right of the State to classify upon the basis of "alienage," and to exclude "aliens" from "public" employment.

Surely, it cannot be said that a state, in passing laws, within its acknowledged power to promote the welfare and prosperity of *its citizens*—one of its rights and duties—cannot, if it sees fit so to do, exclude aliens from employment in the construction of its public works, or that a classification which confines the construction of public works to "citizens" has no basis on which to rest. The classification "*is not an arbitrary classification, but one resting upon considerations of public policy*" arising out of the nature of the employment (*Mobile R. R. v. Turnispeed*, 219 U. S. 35, 44).

**THE STATE'S CONTROL OVER
"PUBLIC WORKS" INCLUDING
THOSE OF ITS MUNICIPALITIES.**

Inasmuch as all questions concerning the construction and interpretation of a State statute, including those involving the scope and purview of its terms, present only questions of local law, the final decision of which rested with the State tribunals (*Union Lime Co. v. Chicago & N. W. Ry. Co.*, 233 U. S. 211, 228; *Carlesi v. New York*, 233 U. S. 51, 56-57; *Keokee Coke Co. v. Taylor*, 234 U. S. 224, 226; *Sioux Remedy Co. v. Cope*, 235 U. S. 197 201) it must now be assumed that the particular work, in the construction of which plaintiff-in-error was engaged, was a "public work" within the meaning of the statute. The decision of the Court of Appeals necessarily so holds.

And the decision of the Court of Appeals in this case is in accord with former decisions of that court in which it was held, either expressly or by necessary implication, that the Municipality of the City of New York, in constructing a *sewer*, under legislative sanction, is engaged in a "public work" or improvement in which it acts as "the agent of the state", and that the construction of such work by the municipality is under legislative or State control.

Hughes v. City of Auburn, 161 N. Y. 96, 104;

Uppington v. City of New York, 165 N. Y. 22, 228, 229;

In re Prot. Epis. School, 46 N. Y. 178, 180-181;

People ex rel. Williams Eng. & Con. Co., 193 N. Y. 148.

In *Hughes v. City of Auburn* (161 N. Y. 96, 104-105), the Court said:

"A municipal corporation is nothing more than an instrumentality of the state for the purpose of local government, exercising delegated powers, which the state can exercise and may withdraw at pleasure.

* * * * *

In the construction and maintenance of a sewer or drainage system a municipal corporation exercises a part of the governmental powers of the customary local convenience and benefit of all the people * *" [pp. 104, 105].

In *Uppington v. City of New York* (165 N. Y. 222), which involved the question of the liability of the city for consequential damages arising from the selection of a route for, and the construction of, a sewer, it was held that in the construction of such work, the municipality acted as the "agent of the state", and that the work was done in the exercise of its governmental powers.

In *People ex rel. Williams E. & C. Co.* (193 N. Y. 148) which involved the validity of a provision of the Labor Law requiring contractors constructing "public works" to pay the prevailing rate of wages to their workmen and limiting the hours of labor, the particular work in question was the completion of a "storm relief sewer", which was necessarily held to be a "public work" within the meaning of the statute.

Other cases which hold that sewers are public works are.

Keefe v. People, 37 Colo. 317, 8 L. R. A. [N. S.] 131—where a similar statutory provision relating to hours of labor was upheld.

Seibert v. Cavender, 3 Mo. App. 421.

In *Paulsen v. Portland* (149 U. S. 40), this Court said:

“A sewer is constructed in the exercise of the police power for the health and cleanliness of the city, and the police power is exercised solely at the legislative will. So also the determination of a territorial district to be taxed for a local improvement is within the province of legislative discretion.”

While the city may be liable in tort to third parties for injuries resulting from its negligence in constructing sewers or in failing to take the proper precautions in cleaning and repairing them, and in that limited sense may occupy a *quasi-private* relationship to *third parties* (*Lloyd v. Mayor*, 5 N. Y. 369, 374, 375; *Quill v. Mayor*, 36 App. Div. 476, 478; *Johnston v. Dist of Columbia*, 118 U. S. 19, 21; *Dillon Mun. Corp.*, 5th Ed. § 39), nevertheless in constructing its sewers, it acts in a public or governmental capacity, and its contracts for such construction are subject to legislative control. In *re Prot. Epis. School*, 46 N. Y. 178, 180-181 (*supra*). Such work is *public* work in every sense, and this, irrespective of whether the city be deemed to act in a strictly governmental—i. e. sovereign—capacity, or by virtue of a special power of a local governmental nature granted to it by the legislature, by virtue of which it undertakes its performance.

In other words, the distinction between the governmental (sovereign) functions of a municipality and those called “*quasi-private*” or municipal or, as it is sometimes called, “*proprietary*,” affords no criterion for determining whether its undertakings are *public* or *private*. An at-

tempt to make that a determining factor was made in *People ex rel. Rodgers v. Coler*, (166 N. Y. 1). It was combatted in a strong dissenting opinion by PARKER, CH. J., the principle of which was adopted and approved in later cases in the Court Appeals (*Ryan v. City of New York*, 177 N. Y. 271; *People ex rel. Williams E. & C. Co. v. Metz*, 193 N. Y. 148), and which are in accord with the decision of this Court in *Atkin v. Kansas* (191 U. S. 207).

But even if the State Court of Appeals had departed from its prior decisions on such a question, this Court will accept the construction of the statute as applied in this case and be bound thereby (*Sioux Remedy Co. v. Cope*, 235 U. S. 197, 201). And the question is whether the statute, as construed and applied in *this* case, is in conflict with the Constitution, laws or treaties of the United States. (*Equitable Life Ins. Co. v. Pennsylvania*, 238 U. S. 143, 145; *Price v. Illinois*, 238 U. S. 446, 451).

HEIM v. McCALL (PUBLIC SERVICE COMMISSION)

The case of *Heim v. McCall et al* (Public Service Commission) involved the same constitutional and treaty questions as the case at bar. It was argued in the Appellate Division of the Supreme Court of New York and in the Court of Appeals with this case. Both cases were considered together (165 App. Div., 449; 214 N. Y. 629, 630). We understand that it has been advanced for argument in this court with the present case and that it will immediately precede it on the calendar.

The decision of the Court of Appeals in that case necessarily holds that the "subway" in New

York City—the particular work there involved—is a “public work” within the meaning of the statute. The statute was so construed and applied by the Court of Appeals (214 N. Y. 629).

This also is in accord with prior decisions of the courts of New York.

Matter of Rapid Transit R. R. Commrs.,
197 N. Y. 81, 97-98.

Sun Printing & Pub. Assn. v. Mayor, 152 N.
Y. 257, 267.

Carpenter v. City of New York, 115 App.
Div. 552, 557-558.

In *Matter of Rapid Transit R. R. Commrs.* (*supra*) the Court said:

“We have held that a subway of the kind in question is built for a city purpose, because it is necessary for the general welfare of the people of the municipality, is **public** in character, sanctioned by its citizens and **authorized by the legislature**, and hence the city has power to construct and pay for it. (*Sun Printing & Publishing Assn. v. Mayor, etc.*, of N. Y., 152 N. Y., 257, 267).”

The Court also said that it was unnecessary to determine whether the work was “governmental” or “proprietary.” It was a “*public*” work [197 N. Y. 81, 97], even though built by the city as a “proprietor” and not as a “sovereign” [*Id.*, p. 96].

The learned counsel who appeared in opposition to the law in *that* case presented an elaborate argument in which he contended that the construction of the subway in New York City was not the construction of a “*public*” work—that it was a “*private*” work of the municipality. He took the

word "private" to include all matters that were not of a strictly *sovereign* nature.

He then contended, on the basis of an assumption to that effect: (1) that the construction of that particular work did *not* come within the purview and contemplation of the statute—that the statute did *not* apply thereto; and (2) that if the statute were deemed to apply thereto it would constitute an unwarranted and unconstitutional interference by the State with what he called the "private" or "contract" rights of the municipality,—claiming that in the performance of the particular work in question, the municipality occupied, with respect to *the State* and its legislative powers, the same position as a private person, and possessed all the contractual rights that would appertain to it in that capacity, and consequently was not subject to the direction of the legislature as to the provisions of its contracts or as to who should be employed or should not be employed in the construction of that work or in the conduct of that enterprise—the building of the subway.

We are not directly concerned with that case. But if the fundamental proposition upon which the argument was founded were regarded as sound, it might affect the decision in *this* case, and, therefore, we shall endeavor to point out the fallacies in the arguments presented.

1. We submit in the first place that the question as to whether or not the work in question in each case was a public work, and the municipality subject to state or legislative control with respect thereto was one for the State Courts to decide, and that their decision thereon will be regarded as

authoritative in this Court. It presents a question of "local policy."

Williams v. Eggleston, 170 U. S. 304, 310.

Forsyth v. Hammond, 166 U. S. 506, 519.

Claiborne County v. Brooks, 111 U. S. 400, 410.

Detroit v. Osborne, 135 U. S. 492, 499.

Old Colony Trust Co. v. Omaha, 230 U. S. 100, 116.

See also Cases cited, *ante*, p. 90.

In *Williams v. Eggleston* (170 U. S., 304, 310), this Court said that

"the regulation of municipal corporations is a matter peculiarly within the domain of State control", * * * a municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the State, for conducting the affairs of government, and as such it is subject to the control of the legislature."

In *Forsyth v. Hammond* (166 U. S., 506, 519), this Court quoting from *Claiborne County v. Brooks* (111 U. S., 400, 410) said:

"It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the Courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State."

In *Detroit v. Osborne*, (135 U. S. 492, 499) the Court said:

"In the case of *Claiborne County v. Brooks*, 111 U. S. 400, 410, it was held that "when the settled decisions of the highest court of a State have determined the extent and character of the powers which its political and municipal organizations may possess the decisions are authoritative upon the courts of the United States."

The Court further stated that a question involving "a consideration of the powers and liabilities granted and imposed by legislative action upon cities within the State" was "*purely local in its significance and extent*" [p. 498].

This Court has, likewise repeatedly held that the question whether property has been taken for a "private" use or for a "public" use so as to permit the exercise of the right of eminent domain with reference to the 14th Amendment, is a question for the State Courts to decide, and upon which their judgment will be accepted, unless clearly without ground.

Union Lime Co. v. Chicago & N. W. Ry. Co., 233 U. S. 211, 218-219 [and cases cited].

Hanston v. Danville & W. Ry., 208 U. S. 598, 607.

It is for the State Courts to decide what shall be deemed "public" uses in that state. It is likewise for them to decide what shall be considered "public" works.

2. The argument was based upon a confusion of terms having varied meanings, and upon a misconception of the relationship of a municipal corporation to the State. It assumed—fallaciously

—that because, in the performance of certain functions and duties, which were not of a strictly governmental (*i. e.*, sovereign) nature, the municipality might occupy, *with respect to third persons*, the status of a “legal individual,” by reason of which it could be made to respond in damages for negligence in the execution of the powers and duties devolved upon it, it, therefore occupied, in all such matters, a like relationship *to the State*. In other words, it was claimed that the power of the legislature over a municipal corporation only extended to those functions which were of a strictly *sovereign* nature, as distinguished from those which, in contradistinction to the term “governmental” or “sovereign” are sometimes called “*quasi private*,” “municipal,” or “proprietary;” and it was sought to limit the term “public works” to matters which were wholly sovereign in their nature and, by analogy, to such matters as those in which the city would be exempt from liability for negligence (see *South Carolina v. United States*, 199 U. S. 437, 461).

It has frequently been said that a municipal corporation has imposed upon it two kinds of powers and duties. These have been called:

(1) *Governmental*—which constitute a part of the general governmental or sovereign administration of the State, and are undertaken by the municipality, through the command of the legislature, as a part of the general functions of sovereignty and for the general benefit of the People as a whole. In these it acts in a “sovereign” capacity.

(2) *Quasi private* or *Municipal* or, as sometimes called, *Proprietary*—including those which, while in a true sense *public*, are exercised, under special legislative grant, in part for the peculiar

benefit of the municipality and its inhabitants; and in the exercising of which the municipality, for some purposes, occupies the status of a legal individual or corporate body, as distinguished from that of a "sovereign" in the strict sense.

Wilcox v. City of Rochester, 190 N. Y. 137, 142.

Missano v. Mayor, 160 N. Y. 123, 129.

Maximillian v. Mayor, 62 N. Y. 160.

Lloyd v. Mayor, 5 N. Y. 369, 375.

Quill v. Mayor, 36 App. Div. 476, 478, 479.

South Carolina v. United States, 199 U. S. 437, 461, 462, 463.

Dillon, Mun. Corp., 5th Ed. §39.

These "municipal" functions are sometimes called "*private*" just as the governmental (sovereign) functions are sometimes called "*public*"—an unfortunate terminology, since all municipal corporations are *public* as pertaining to the public nature of the corporation; and it is this *public* nature of these corporations that lies at the basis of the distinction between them and private corporations so far as the question of *legislative control* is concerned. (Dillon, Mun. Corp., 5th Ed., Vol. I, §90).

So that, the broad classification into matters "governmental" (*i. e.*, sovereign) in the strict sense, and "*quasi private*" is obviously incomplete for all purposes. It is fundamentally and chiefly of value only in the determination of those questions involving the relationship of the municipality to *third persons*—the civil liability of the city to *third persons* for damages caused by the *negligent execution* of the powers or functions. For *that limited purpose*, and in that lim-

ited sense, the broad classification may be sufficiently accurate. (*Wilcox v. City of Rochester*, 190 N. Y. 137, 142; *Missano v. Mayor*, 160 N. Y. 123, 129; *Maximilian v. Mayor*, 62 N. Y. 160; *Lloyd v. Mayor*, 5 N. Y. 369, 375; *Dillon on Mun. Corp.*, 5th Ed., §39) but it is of little or no assistance in determining questions concerning the extent of *legislative control* over the municipal corporations in relation to matters of a public nature or affected by a public interest, such, for example, as the carrying on of public utilities, the construction of public works—sewers, waterworks, highways and the like—which constitute a large category of a municipality's affairs, and which are "*public*" functions in the truest sense, though perhaps occasionally of a local character. These are truly *governmental* functions—functions of government—even though they are not strictly of a "*sovereign*" nature. They are "*public works*."

Even where, for some purposes, the municipality may be considered to act as a "legal individual", a corporate body, in the exercising or performance of the function, the function itself is a "*special power granted to it by the legislature*" (*Missano v. Mayor*, 160 N. Y. 123, 129; *Lloyd v. Mayor*, 5 N. Y. 369, 375; *Maximilian v. Mayor*, 63 N. Y. 160). [*Barnes v. Dist. of Columbia*, 91 U. S. 540, 544].

Those functions or powers, then, which fall within the broad class called for some purposes (liability in tort and the like) "*quasi-private*" or "*municipal*," as distinguished from "*governmental*" (sovereign), in the strict sense above noted, may be further divided into *public* and *private*. And we must keep clearly in mind not

only the distinction between matters governmental (sovereign) and *quasi* private—private in a broad sense and for the purpose of determining civil liabilities to third parties for negligence and the like—and between matters which, while they may be considered private in *that* sense, are nevertheless truly public and entirely *public* so far as the relations of the corporation *to the State* are concerned, and are thus *public* as distinguished from those wholly and *entirely* private for all purposes, and even as regards the State. In other words, a great mass of a municipality's functions and powers may be private in their execution as regards third parties but they are *public* in regard to *the State*. They are "public" matters, authorized by the legislature, and subject to legislative control (Dillon, Mun. Corp. 5th Ed. Vol. I, p. 184. Note summarizing *Darlington v. Mayor*, 31 N. Y. 164.)

It is to these "public matters," such as the building of public improvements, the construction of public works, the holding of public property and the like, which are *public* functions, that attention must be particularly directed in this case. The statute relates to the "construction of public works." The distinction to be observed in this case is that between "public" functions, in the broad sense, and those strictly private.

There may be a few matters of *strictly private* concern—such as the holding of land in fee or property by legislative grant or by virtue of some ancient charter, where, in the peculiar circumstances of the case, a situation analogous to a *contract* obligation would arise and operate as a bar to certain kinds of legislative action, but these are rare and special exceptions, and may be elimi-

nated from further consideration in dealing with the general subject of legislative control over municipal corporations in matters of public (using the word in the broad sense) concern, matters of what may be called a local governmental nature—the erection of public works, the carrying on of public undertakings. As respects *the State* such matters are wholly *public* and, as we have said, the legislature (except where it is restrained by *special* constitutional provision, operating as a restriction on the general sovereign power exercised by the legislature) has over them complete and transcendent control. From it such corporations derive their being and *all the powers they possess*. It made them and it may regulate or even destroy them at its uncontrolled will. As *against* it they have no *contract*, they have no *vested rights*.

- People *v.* Morris, 13 Wend. 325, 329;
 Darlington *v.* Mayor, 31 N. Y. 164;
 Demarest *v.* Mayor, 74 N. Y. 161, 167;
 McMullen *v.* City of Middletown, 187 N. Y.
 37, 44;
 New Orleans *v.* New Orleans Water Works,
 142 U. S. 79;
 Laramie County *v.* Albany County, 92 U. S.
 307;
 Mount Pleasant *v.* Beckwith, 100 U. S. 514,
 525;
 Atkin *v.* Kansas, 191 U. S. 207;
 Cooley Const. Lim., 7th Ed. 266-268.

What constitutes a contract in the case of a private corporation—its charter—is as to a *public* corporation a “legislative command” (State

Bank v. Knoop, 16 How. 369, 380) subject to change at the legislative will—limited only by *specific* constitutional restriction.—Of course, we are not now concerned with the restrictions of *State* constitutional provisions.

COOLEY says:

“The rights and franchises of such a corporation, being granted for the purposes of government, can never become such vested rights as against the State that they cannot be taken away; nor does the charter constitute a contract in the sense of the constitutional provision which prohibits the obligation of contracts being violated. Restraints on the legislative power of control must be found in the Constitution of the State, or they must rest alone in the legislative discretion. *If the legislative action in these cases operates injuriously to the municipalities or to individuals, the remedy is not with the courts.* The courts have no power to interfere, and the people must be looked to, to right through the ballot box all these wrongs.”

Cooley, *Const. Lim.*, 7th Ed., pp. 266-269.

DILLON in his work on *Municipal Corporations* (5th Ed., Vol. I, §39) says:

“Concerning the distinction mentioned in the preceding section [§ 38] the following views may, perhaps, on principle be considered as sound. As respects the usual and ordinary legislative and governmental powers conferred upon a municipality, the better to enable it to aid the State in properly governing that portion of its people residing within the municipality, such powers are in their very nature public, although embodied in a charter and not conferred by laws general in their nature and applicable to the entire State.

But powers or franchises of an exceptional, or extraordinary or non-municipal nature may be, and sometimes are, conferred upon municipalities, such as are frequently conferred upon individuals or private corporations. Thus, for example, a city may be expressly authorized in its discretion to erect a public wharf and charge tolls for its use, or to supply its inhabitants with water or gas, charging them therefor and making a profit thereby. In one sense such powers are *public* in their nature, because conferred for the public advantage. *In another sense, they may be considered private*, because they are such as may be, and often are, conferred upon individuals and private corporations, and result in a special advantage or benefit to the municipality as distinct from the public at large. **In this limited sense, and as forming a basis for the implied civil liability for damages caused by the negligent execution of such powers, it may be said that a municipality has a private as well as a public character.** And so, as hereafter shown, a municipality may have property rights which are so far private in their nature that they are not held at the pleasure of the legislature."‡

Even in such cases the legislature might give or take away a right of action (*McMullen v. City of Middletown*, 187 N. Y. 37; *Scott v. Village of Saratoga Springs*, 199 N. Y. 178; *Murphy v. Village of Fort Edward*, 213 N. Y. 397, 400), all of which illustrates the supreme and transcendent control which the legislature possesses over them in all things. And the question is one of local policy (*Detroit v. Osborne*, 135 U. S. 492, 499).

In *McMullen v. City of Middletown* (*supra*) the question of legislative control over municipal

‡This will be considered later.

corporations is discussed at length by GRAY, J., speaking for the Court of Appeals. The opinion is too long to quote from, but it asserts the broadest measure of control over such corporations by the legislature, stating that "the whole interests are the exclusive domain of the government itself, and the power of the legislature over them is supreme and transcendent; except as restricted by the Constitution of the State" [187 N. Y. 42]. See also *Barnes v. Dist. of Columbia*, 91 U. S. 540, 544 [*vid. post*, p. 147].

In the section immediately preceding that above quoted, Judge Dillon says [§ 38]:

"that a municipal corporation is in any just view a *private corporation*, or possesses a double character, the one private and the other public, although often asserted, is *only true in a modified sense*. In their nature and purposes, municipal corporations, however numerous and complex their powers and functions, are **essentially public**" [§ 38].

He points out that counties—*quasi* corporations—are "purely auxiliaries of the State" (§ 37) and "the *statutes* confer on them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject"; and, while MUNICIPAL CORPORATIONS stand on a somewhat different footing in this: that while they may be liable for acts in the performance of duties which are not "governmental" in the strict and limited sense, without express statute giving a right of action,‡ it is in *that limited sense* that they are considered to have a *private* character—but this does not divest them of their

‡The liability given at common law was in its inception "judicial legislation" to prevent wrongs going unremedied.

wholly *public* character in their relations *to the State* in matters affected with a public, though primarily a local, interest.

Dillon Mun. Corp. 5th Ed. §§ 37, 38, 39.

See: *Ryan v. City of New York*, 177 N. Y. 271, 273, 277.

Darlington v. Mayor, 31 N. Y. 164.

McMullen v. City of Middletown (*supra*).

Judge Dillon emphasizes the *fundamental distinction* between "*public*" and "*private*" corporations. The charter of the latter, while granted by the legislature, is in the nature of a *contract*, and as such is not subject to change or impairment by the legislature without the corporation's consent, unless such right is reserved at the time of the grant of incorporation. This is based upon the decision in the famous *Dartmouth College case* (4 Wheat. 518). "*But the charter or incorporating act of a municipal corporation is in no sense a contract between the State and the corporation*" (§92).

Covington v. Kentucky, 173 U. S. 231.

New Orleans v. New Orleans Water Works, 142 U. S. 79.

Mt. Pleasant v. Beckwith, 100 U. S. 514.

Laramie County v. Albany County, 92 U. S. 307.

Demarest v. Mayor, 74 N. Y. 161, 166.

Darlington v. Mayor, 31 N. Y. 164, 194-196.

McMullen v. City of Middletown, 187 N. Y. 37, 42.

It is true that JUDGE DILLON says that a municipality "may have property rights which are so far

private in their nature that they are not held as the pleasure of the legislature" (§39 *vid. ante*, p. 104). Concededly, these are difficult to define; and the cases on the subject in this Court are not numerous (Cooley Const. Lim., 7th Ed., p. 342; Dillon, Mun. Corp. 5th ed. §111; *Hunter v. Pittsburgh*, 207 U. S. 161, 180-181). The decisions in the different states vary according to their *local policy* [*vid.* Note 48 L. R. A. 465].

There may be some question concerning the scope of legislative power over lands held by the City of New York in fee by virtue of ancient grants in the Dongan or Montgomerie charters and whether the legislature could divest the city of such lands without compensation, (Dillon, §111; *Webb v. Mayor*, 64 How. Pr. 10) but a discussion of such questions, however interesting it might be, has no place in *this* case and could perform no useful purpose—and even in the *Webb* case (*supra*) resort was had to a *specific State* constitutional provision [64 How. Pr. p. 17].—Some reference to this was made in the opinion of the Appellate Division in this case [165 App. Div. 449, 459].

It might be remarked, in passing, that the Court of Appeals has said that

"The corporation of the city of New York is a public corporation, and hence its charter is always subject to amendment or alteration by the legislative power, except as restrained by some constitutional inhibition. The Dongan and Montgomerie charters have no peculiar sanctity because they were granted under the sovereigns of England. They were public charters granted for public purposes, and are as much subject to legislative

control as charters of the same kind granted by the Legislature of the State."

Demarest v. Mayor, 74 N. Y. 161, 166.

It is there further said, quoting from Cooley's Constitutional Limitations:

"The creation of municipal corporations, and the conferring upon them of certain powers and subjecting them to corresponding duties, does not deprive the Legislature of the State, of that general control over their citizens which was before possessed. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic, or unjust, and even abolish them altogether in the legislative discretion. The rights and franchises or such a corporation, being granted for the purposes of the government, can never become such vested rights as against the State that they cannot be taken away; nor does the charter constitute a contract in the sense of the constitutional provision which prohibits the obligation of contracts being violated. Restraints upon the legislative power of control must be found in the Constitution *of the State*, or they must rest alone in the legislative discretion."

Demarest v. Mayor, 74 N. Y. 161, 167.

See also:

People v. Pinckney, 32 N. Y. 377.

And it may be assumed that there are or may be in municipalities certain vested rights of property in respect to "private" property, which are not *completely* under the uncontrolled will of

the legislature, and which will be protected from confiscatory action on the part of the legislature, and which it might not have power to wholly divert to *any use* it saw fit, and particularly where vested interests of third parties would be affected (Cooley Const. Lim., 7th Ed., pp. 390-392; *Id.*, pp. 342, *et seq*; Worcester v. St. Railway Co., 196 U. S. 539, 551; Commissioners v. Lucas, 93 U. S. 108, 114, 115). [*Webb v. Mayor, supra*].

In *People v. Ingersoll* (58 N. Y. 1) the Court said:

“A county is not independent of the State, an *imperium in imperio*, but is in all things subject to the State and the legislature of the State, as sovereign, and its boundaries, its rights, privileges and powers may be enlarged or curtailed, and its property and property rights controlled from time to time, in the discretion of the legislature; but when grants, whether of rights or of power, are conferred by the legislature they are held absolutely, and to be enjoyed and exercised independently, subject only to the general laws of the State, the terms and conditions annexed to the grant, *until withdrawn or modified by the legislature*. This is consistent with *The Town of Guilford v. Supervisors of Chenango* (3 Kern., 143), and *Darlington v. Mayor of New York* (31 N. Y. 164). Chancellor KENT, in speaking of **municipal corporations**, says: ‘They may be empowered to take or hold private property for municipal uses, and such property is invested with the security of other private rights.’ (2 Kent’s Com., 275.) As remarked by Judge Denio, in *Darlington v. Mayor, etc. (supra)*: ‘*This does not exempt such property from legislative control, and, in that respect, property rights stand upon the same footing as other corporate rights, whether political or civil.*’

Property owned by a city, county or other municipal or local government, is held by it as a public corporation and subject to the law-making power, and the governing body, by whatever name called and known, are merely trustees for the public, who are the *cestui que trust* of the corporation. A municipal corporation is the trustee of the inhabitants of the territory embraced within its limits" [pp. 21, 22].

The point decided in this *Ingersoll* case and in *People v. Fields* (58 N. Y. 491) was that, **unless expressly given by statute**, an action could not be maintained by the Attorney-General in the name of the State to recover moneys fraudulently taken from the county treasury. The plenary power of the legislature was not denied, but, on the contrary affirmed [58 N. Y. 29, 30, 31].

In *McMullen v. City of Middletown* (187 N. Y. 37), GRAY, J., writing for the Court of Appeals said:

"A municipal corporation is a political, or governmental agency of the state, which has been constituted for the local government of the territorial division described and which exercises, by delegation, a portion of the sovereign power for the public good. In its organization and in the assignment of its powers and duties, the legislature acts supremely" [p. 41].

* * * * *

"These corporations are bodies politic; created by laws of the state for the purpose of administering the affairs of the incorporated territory. They exercise powers of government, which are delegated to them by the legislature, and they are subjected to certain duties. They are the auxiliaries, or the con-

venient instrumentalities, of the general government of the state *for the purpose of municipal rule*. The consideration of the grant of a charter is the benefit to the public and their relation to the state is not contractual, in the constitutional sense; for there is no element of reciprocity and the corporate duties are incompatible with the notion of a compact. *The whole interests are the exclusive domain of the government itself and the power of the legislature over them is supreme and transcendent*; except as restricted by the Constitution of the state. Their charters being granted for the better government of the particular districts, *the right to insert such provisions as seem to best subserve the public interest would seem, from the very nature of such institutions, to be inherent*" [p. 42].

He goes on to state that

"A municipal corporation is but a part of the machinery of government; that it is the creation of the legislature which endows it with certain local governmental functions and imposes upon it the performance of certain duties, and that *its every feature is subject to the regulation of the legislature* in granting the charter and to the right of that body to change, or to modify, as the public interest may demand. It exists for the benefit of the public and of the incorporated community, and but incidentally for that of the individual" [p. 43].

He continues:

"*In the exercise of powers and in the performance of duties, which are affected by a public interest, it acts for the state*, and it is for the legislature to prescribe whether, and how far, for the breach of a public duty, the individual may maintain a civil action to remedy an injury occasioned thereby. It is diffi-

cult to perceive the basis for any claim to an absolute right to the preservation of a remedy against this municipal adjunct of the state sovereignty. *The charter is not a contract* with the individual and I am not aware of any limitations upon the power of the state, outside of the Constitution, to adjust every governmental relation with the citizen, as it may seem discreet and best for the general welfare."

MacMullen *v.* City of Middletown, 187 N. Y., 37, 43.

In *People ex rel. Williams Eng. & Con. Co. v. Metz* (193 N. Y. 148, 161) the Court said using the words of this Court in *Hunter v. Pittsburgh* (207 U. S. 161, 178):

" 'Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be intrusted to them. * * * The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. * * * The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the State Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.' " [p. 161.]

JUDGE DILLON says that it is not easy to define the *private* character ascribed to the powers of municipal corporations in determining questions of legislative control. He continues:

"It is easy to understand that if, under the exercise of lawful powers by the authority of the legislature, property has been acquired by a municipality, such property may not be subject to legislative appropriation to uses distinctly foreign to the interests of the municipality; but in what sense are powers conferred and to be exercised for the good of all the people of the place private? Wherein do such powers, in their origin or nature, differ from those admitted to be public? Are not *all* powers conferred upon municipalities, whether many or few, given, and given only, for their better regulation and government, and to promote their welfare as parts of the Commonwealth? The small municipality, with few and simple powers, is no more completely under the supreme dominion of the legislature than the more populous one, requiring for its proper government organs and powers peculiar to itself. Are the latter, therefore, private? If so, it must be in a qualified and peculiar sense. Contracts *in favor of the creditor* are protected by the national Constitution: but *as against a State*, the difficulty is to find a logical and sound basis on which to rest private rights in favor of a municipality, if, under the Constitution of the particular State, it is within the power of the State which breathed into it the breath of life utterly to extinguish its existence at pleasure. The distinction originated with the courts, to promote justice, and has been most frequently applied to escape technical difficulties in order to hold such corporations liable to private actions."

Dillon, Mun. Corp. 5th Ed. §110.

Let it be assumed that it would be "consonant with natural justice" that property acquired and owned by a municipal corporation in its "private" or proprietary capacity should not be subject to an *unlimited* power of the legislature over it to any extent that it saw fit, and that general "due process" constitutional provisions—the 14th amendment—might be invoked to prevent its arbitrary confiscation or destruction, yet it would seem to be obvious that regulations of the use of property, and of the contractual powers of the city with respect thereto, when it is held for some public use, should be subject to legislative control and direction. Any other doctrine would be wholly illogical and inconsistent with the relations of a municipality to the State (*Atkin v. Kansas*, 191 U. S. 207; *People ex rel. Williams E. & C. Co. v. Metz*, 193 N. Y. 148, 161) [*vid. cases post*, p. 126].

The exaction of an obedience to the employment policy of the State in the performance of public municipal enterprises, undertaken by legislative sanction and authorization, by which the contractual rights of the municipality are to some extent controlled or diminished would not constitute a taking or deprivation of the property of the municipality in a constitutional sense (Cf. *Chicago & A. R. R. v. Tranbarger*, 238 U. S. 67, 78).

The "right to contract", as this Court has said, "may be regulated and sometimes prohibited when the contracts or business conflict with the *policy of the State* as contained in its statutes."

Williams v. Fears, 179 U. S. 270, 274.

Allgeyer v. Louisiana, 165 U. S. 578, 591.

Holden v. Hardy, 169 U. S. 366.

And by the statute here in question the State has declared its policy and "has enjoined upon its several agents and agencies the duty of executing this policy" (Opin. of Parker, Ch. J., in *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 25—See also *Ryan v. City of New York*, 177 N. Y. 271).

The legislature, which conferred the power of performance, may regulate the mode of performance, and confirm it to the policy of the State (*Atkin v. Kansas*, 191 U. S. 207).

"If the legislation retards public improvements or increases municipal debts, or does not work well in other respects, there is ample room for public sentiment to act through the chosen representatives of the people."

People ex rel. Williams Eng. & Con. Co. v. Metz, 193 N. Y. 148, 159.

Continuing his consideration of the question of legislative control with respect to the public utilities undertaken by municipal corporations JUDGE DILLON says [§ 116]:

"Thus, it has been doubted whether there is any rule which draws the line between powers which are governmental in their nature and those which relate to the local convenience of the citizens and are private and proprietary in their nature, and to place those relating to water, gas, and public parks on the *quasi* private side of the corporation. Subjects of that character might under some aspects be regarded as properly belonging to the private affairs of a corporation, but under others would be regarded as a *public* matter. Public parks, gas, and water in towns and cities may ordinarily be classed as private affairs, but they often become mat-

ters of public importance, and when the legislature determines that there is a public necessity for their use in a certain locality, it has been said that they cannot be designated as the mere private affairs of the corporation. That is a relative question. Therefore, as a part of a purpose of securing an adequate supply of pure water to a city, it has been held that it is within the power and scope of the legislature to provide therefor, and to appoint the agents by whom the work shall be constructed or purchased for the benefit and at the expense of the municipality. Even when a city has already, through money derived from taxation or otherwise, acquired its own municipal water works, it has been held that there is no principle of law which gives to the city any vested or constitutional right *as against the State* to manage and control its water works or to appoint agents or managers to control them, and that the legislature may regulate the management of the water works of the municipality and, if it sees fit, appoint the agents and managers therefor. The court declared that while the municipality exists as a corporation endowed with the capacity of purchasing and holding property, it has a right, *as against every other corporation or person*, to the use and enjoyment of its property as fully as a private person can hold and enjoy similar property. But cities as corporations are emanations of the supreme law-making power of the State, and they are established for the more convenient government of the people within their limits. Although the title to property is vested in the corporate body, it is not to be shielded from the control to a certain extent of the legislature. While the corporation exists by authority of the State and is authorized to purchase and hold property for the inhabitants to be paid by taxation,

the State cannot take away such property and give it to other corporations or persons by the appointment of a board of commissioners, but the action of the legislature complained of was not a diversion of the property from the purposes of its acquisition. No title is to be diverted and no property is wrongfully taken, whether managed by the city council or by a board of commissioners appointed by the authority of the legislature; the uses and purposes of the water works—the supplying of water to the corporators, or inhabitants of the city—will be the same, and while these purposes and objects continue the same, there is no violation, by the act of the legislature in appointing a board of commissioners, of any equitable right of which the city may complain.”

Dillon, Mun. Corp., 5th Ed., §116, pp. 200-201.

Would those who contend for a denial of legislative supremacy over property of municipal corporations, held by them for local public needs, and held by them in a “proprietary” as distinguished from a “sovereign” capacity, urge that the municipality would have the absolute right to dispose of the property in any manner it saw fit? We do not apprehend that they would make such a claim; and yet it would be a logical outcome of their contention. To accept the contention of those who assert the existence of broad municipal powers, independent of the legislature, in effect would be to make municipalities *imperia in imperio*. A bad result suggests a wrong construction.

The courts of New York have asserted the broadest measure of legislative control over municipal

corporations and their property. A leading case is *Darlington v. Mayor* (31 N. Y. 164) in which the subject is most exhaustively discussed by the learned DENIO, CH. J. This opinion should be read *in toto*. Its substance is thus summarized by JUDGE DILLON:

“The Chief Justice there asserts the unlimited power of the legislature over municipal corporations and their property. He maintains that such corporations are altogether public, and all their rights and powers public in their nature, and that their property though held for income or sale, and unconnected with any use for the purposes of the municipal government, is under the control of the legislature, and not within the provisions of the Constitution protecting private property. He denies the correctness of the distinction taken in *Bailey v. Mayor, &c.*, of New York, 3 Hill 531,† and other cases *between the public and private* functions of city governments, and maintains that, as respects *the State* all their powers and functions are public. He affirms that the legislature may compel a municipal corporation to submit to arbitration claims as to which private corporations and natural persons would be entitled by the constitution to a trial by jury.”

Dillon, *Mun. Corp.*, 5th ed., Vol. I, p. 184,
Note 1.

Darlington v. Mayor 31 N. Y. 164.

Again speaking of this opinion JUDGE DILLON says:

“On the other hand it is the opinion of a distinguished and able judge in New York, in a case already mentioned, that the authority of the legislature over the powers rights and

†See also *Fire Ins. Co. v. Keeseville*, 148 N. Y. 46, 55.

property of municipal and public corporations is, **as respects the corporations, quite without limit."**

Dillon Mun. Corp., 5th Ed., p. 186.

The opposite view is contended for by the Michigan courts in *People v. Hurlbut* (24 Mich. 44) and *People v. Detroit* (28 Mich. 228). It seems to be founded on a supposed "inherent right" of self-government. The question, as we have said, is one of local policy, and the cases in the different states exemplify the local viewpoint.

The point involved in the *Hurlbut* case was the validity of a statute which established a board of public works and appointed the members thereof for a full term. COOLEY, J., announced the proposition that there was in municipalities an inherent right of local self-government independent of constitutional grant, with which the Legislature was not authorized to interfere. It was substantially upon this theory that he asserted the invalidity of the statute. The opinion was, however, qualified and explained in later cases in the same court where, as is pointed out in *Citizens St. Ry. v. Detroit Ry.* (171 U. S. 48, 51), quoting from *People v. Detroit* (*supra*) it is said:

"We intended in that case to concede most fully that the State must determine for each of its municipal corporations the powers it should exercise, and the capacities it should possess, and that it must also decide what restrictions should be placed upon these, as well to prevent clashing of action and interest in the State as to protect individual corporators against injustice and oppression at the hands of the local majority. And what we said in that case we here repeat—that, while it is a

fundamental principle in this State, recognized and perpetuated by *expressed provisions of the constitution*, that the people of every hamlet, town and city of the State are entitled to the benefits of local self-government, the constitution has not pointed out the precise extent of local powers and capacities, but has left them to be determined in each case by the legislative authority of the State from considerations of general policy, as well as those which pertain to the local benefit and local desires. And in conferring those powers it is not to be disputed that the legislature may give extensive capacity to acquire and hold property for local purposes or it may confine authority within the narrow bounds; *and what it thus confers it may enlarge, restrict or take away at pleasure.*" [171 U. S. 51.]

With respect to this so-called inherent right of local self-government, it may be stated that the vast weight of authority is to the effect that it does not exist—and such is the rule in **New York**.

Judge Dillon says (§98):

"It must now be conceded that the great weight of authority denies *in toto* the existence, in the absence of special constitutional provisions, *of any inherent right of local self-government which is beyond legislative control.*"

The Constitution of **New York** specifically guarantees the right of local self-government to the extent of the election of or appointment of local officers and the continuance in their hands of the existing local functions. It goes no further.

The restrictions on the Legislature are only such as are expressly imposed.

McMullen v. City of Middletown, 187 N. Y. 37.

People ex rel. Devery v. Coler, 173 N. Y. 103.

People ex rel. v. Tax Commrs., 174 N. Y. 417, 433-435.

People ex rel. Simon v. Bradley, 207 N. Y. 592, 611.

The Supreme Court of Connecticut also takes the emphatic view that no inherent right of local self-government exists, and that the power of the Legislature over municipalities is only limited by express constitutional restriction. It may be compelled to spend its money for local improvements without violating the 14th Amendment.

State ex rel. Bulkeley v. Williams, 68 Conn. 131, 48 L. R. A. 465; *affd. as Williams v. Eggleston*, 170 U. S. 304.

The Legislature has the power to disregard, if it sees fit, local subdivisions and to ignore the municipality to the extent of creating new districts within it and of appointing state officials in those districts for the performance of functions which the municipality ordinarily performs. In other words, there is no such thing under the general provisions of the Federal or State Constitutions as the *inherent right* of local self-government.

People v. Draper, 15 N. Y., 532.

People v. Pinckney, 32 N. Y., 377.

Astor v. Mayor, 62 N. Y., 567.

In the *Astor* case (*supra*), the Central Park Commission was created by the Legislature with

power not only over the park, but over the care, management and control of streets above 110th Street. The objection to the statute organizing this commission investing it with its specific powers was that it took from the municipal authorities power which had been vested in them at the time of the adoption of the Constitution of the State then in force. The court held that the act was constitutional, particularly with reference to the provision of the State Constitution of 1846, which provided that city officers whose election is provided for by the Constitution should be elected by the electors of the city, etc.

In the *Pinckney* case (*supra*), the legislature created a metropolitan fire department embracing the cities of New York and Brooklyn, and gave it functions to the exclusion of the existing fire department of the City of New York. In sustaining the act, the Court said:

“The legislature may recall to itself, and exercise at its pleasure, so much of the powers it has conferred upon the city corporation as are not secured to it by the Constitution. This necessarily results from the fact that all the legislative power of the people is granted to the legislature except such as is *expressly* reserved.”

People *v.* Pinckney, 32 N. Y., 377, 393.

In the *Draper* case (*supra*), the Court sustained a similar provision with reference to a new police district, the officials of which were to be appointed by the Governor and the Senate.

Those cases were approved in *People ex rel. v. Tax Commrs.*, 174 N. Y. 417, 444-446.

JUDGE DILLON, speaking of this, says [5th Ed. § 101, p. 170]:

“Notwithstanding the constitutional provision, acts authorizing State officials to erect public buildings and lay out and improve streets, parks, and highways, the expense of which was to be paid locally, have been uniformly sustained by the New York courts, although the power to make such improvements had been previously vested in the local authorities, and it was urged that the transfer of the power was an encroachment upon local self-government.”

THE RAPID TRANSIT LEGISLATION.

The State of New York, in relation to the great transit improvements in the City of New York, has consistently proceeded upon the principle that it had the power to confer upon a *State* body control over the construction and regulation of the city subways and transit facilities. A series of legislative acts, begun with the enactment of the so-called RAPID TRANSIT ACT (L. 1891, Ch. 4; Am'd. L. 1892, Ch. 102, 556) is fairly illustrative of the principle upon which the State of New York has acted.

These first enactments conferred upon the Board of Rapid Transit Commissioners, a state body, the power to determine the necessity for rapid transit railways and the establishment of routes and plans of construction. Section 10 of the Rapid Transit Act, as amended by the Laws of 1892, provided that the Board of Estimate and Apportionment of the City of New York, at the request of the Rapid Transit Board, give money for its purposes. Subsequent amendments con-

tained similar provisions for appropriations upon the request of this state body (L. 1894, Ch. 752, § 10).

Even the details of contracts by which the City of New York was bound in connection with the scheme of rapid transit development, was provided for by state law (L. 1896, Ch. 729, § 34; L. 1902, Ch. 554, § 34; L. 1905, Ch. 599, § 34).

In 1907 the Rapid Transit Board was abolished and the Public Service Commission Law (L. 1907, Ch. 429) was enacted. This act conferred jurisdiction upon a state body, appointed by the Governor, and known as the Public Service Commission of the First District, over all railroads and common carriers transacting business within the City of New York. Wide powers were conferred upon this body, and the Estimate Board of the City of New York was required to pay obligations contracted for by the Public Service Commission through the issuance of city bonds (L. 1908, Ch. 422). Later enactments still further prescribed the terms of agreements concerning transit developments to which the city was a party, and conferred most of the discretion upon the Public Service Commission (L. 1909, Ch. 498; L. 1912, Ch. 226)—*a State agency*.

The right of the state to regulate the affairs of the City of New York on purely local matters, such as the construction of local railroads, the granting of franchises, the laying out of routes, the terms of contracts between the city and railroad and construction companies, as well as the making of appropriations in connection with these purely local matters, has not been questioned heretofore, and there seems to have been a complete

acquiescence on the part of all concerned in the right of the state so to regulate these corporate or purely local affairs of the City of New York.

In *People v. Kerr* (27 N. Y. 188, 213) the Court said:

“The city corporation, as freeholder of the streets, in trust, for public use as highways, is but an agent of the State. Any control which it exercises over them, or the power of regulating their use, is a mere police or governmental power delegated by the State, subject to its control and direction, and to be exercised in strict subordination to its will.”

No one would deny that the laying out and improvement of streets for public travel is a public work and a “function of government”; yet a city may be liable for negligence in failing to repair them and keep them safe for travel (*Turner v. Newburgh*, 109 N. Y. 301; *Quill v. Mayor*, 36 App. Div., 476, 478; *Barnes v. Dist. of Columbia*, 91 U. S., 540)—unless the legislature otherwise provides (*McMullen v. City of Middletown*, 187 N. Y. 37). The building of a subway or street railway is but an extension of this function arising from modern conditions. It is a step in the social evolution, a mark in the transition from individualism to a modified collectiveism. The activities of the State are becoming “more and more” and their functions increasing with the development of social conditions (See Dicey’s *Law & Opin. in England*).

The cases are innumerable which exemplify the plenary power of the legislature over municipally pay corporations—even in matters which are not of a strictly “sovereign” nature. They illustrate

the practically unlimited control which the legislature may exercise over the contractual and property rights of municipalities in matters even of a local character which are affected with a public interest—the word public being used in the broadest and most inclusive sense. They show that a municipality may be compelled to spend its money in connection with matters which are in no sense sovereign in their nature, and that, in all its powers and functions and duties, it is subject to the will of the state, which created it, expressed through the medium of legislative enactments. In their relations *to the State*, in all matters of a “public” nature, they have no contractual rights independent of the will of the legislature. These principles have been asserted in many cases in this Court, in the courts of New York, and in those of other states.

Atkin v. Kansas, 191 U. S. 207.

Hunter v. Pittsburgh, 207 U. S. 161, 178.

Williams v. Eggleston, 170 U. S. 304, 310;
aff'g. State ex rel. Bulkeley v. Williams,
 68 Conn., 131.

Barnett v. Denison, 145 U. S. 132, 139.

Hill v. Memphis, 134 U. S. 198, 203.

Met. R. Co. v. Dist. of Columbia, 132 U. S.
 8.

Meriweather v. Garrett, 102 U. S. 472, 513.

Mount Pleasant v. Beckwith, 100 U. S. 514,
 524.

Laramie County v. Albany County, 92 U.
 S. 307.

Barnes v. Dist. of Columbia, 91 U. S. 540,
 544.

United States v. Railroad Co., 17 Wall (84
 U. S.) 322, 329.

- People *ex rel.* Williams E. & C. Co. *v.* Metz,
193 N. Y. 148, 161 [following Hunter *v.*
Pittsburgh and Atkin *v.* Kansas, *supra.*]
McMullen *v.* City of Middletown, 187 N. Y.
37.
Ryan *v.* City of New York, 177 N. Y. 271.
Demarest *v.* Mayor, 74 N. Y. 161, 166, 167.
People *v.* Ingersoll, 58 N. Y. 1, 21, 22, 29-
31.
People *v.* Pinckney, 32 N. Y. 377, 393.
Darlington *v.* Mayor, 31 N. Y. 164.
People *v.* Morris, 13 Wend., 325, 329.

It is true that the cases in the different States do not exhibit a unanimity of opinion respecting the extent of the legislative control over municipal corporations [*Vide* Note, 48 L. R. A. 465]. But, as we have said, the matter is one involving, largely if not entirely, questions of local policy (*Detroit v. Osborne*, 135 U. S. 492, 498, 499).

Many of the decisions in the different States turn upon local constitutional questions, or are based upon the peculiar local view entertained of the State's relation to its municipal corporations. For example the Michigan cases.

The New York Court of Appeals has said:

"Legislative restriction, or regulation, is especially justifiable where the provision has relation to the performance of duties which, as in this case, though for the corporate benefit, are, also, of public interest."

McMullen *v.* City of Middletown, 187 N. Y.
37, 46.

The control of the legislature in "public" matters is almost universally conceded. And the

decision of the State as to what are public matters is final unless it is clearly groundless (*vid.* *Union Lime Co. v. Chicago N. W. Ry.*, 233 U. S. 211, 218).

Many examples might be cited of the exercise of legislative power over municipalities. Thus :

An Act was sustained which required a town to issue bonds, the proceeds of which were to be used in the improvements of highways.

People ex rel. McLean v. Flagg, 46 N. Y. 401.

An act was sustained authorizing the levy of a tax to pay a contractor for a sewer a sum of money in addition to the contract price, which the city was forbidden by its charter to pay.

Brewster v. Syracuse, 19 N. Y. 116.

An act was sustained requiring the City of New York to pay a claim which, though it may not have had a legal, had a meritorious basis. In that case, the Court said :

“Municipal corporations are creatures of the state and exist and act in subordination to its sovereign power. The legislature may determine what moneys they may raise and expend, and what taxation for municipal purposes may be imposed; and it certainly does not exceed its constitutional authority when it compels a municipal corporation to pay a debt which has some meritorious basis to rest on.”

Mayor v. Tenth Nat. Bk., 111 N. Y. 446.

See also, to the same effect :

Guilford v. Cornell, 13 N. Y. 143.

Syracuse v. Hubbard, 64 App. Div. 587.

New Orleans v. Clark, 95 U. S. 644, 654.

Guthrie Nat. Bank v. Guthrie, 173 U. S. 528, 536.

An act was sustained which ratified a contract made by the municipality "for regulating, grading and setting curb and gutter stones", and for "flagging the sidewalks" on Tenth Avenue, New York City, even though the contract may have been *ultra vires* when made. The power of ratification results from the legislative power to have originally authorized the making of the contract.

Brown v. Mayor, 63 N. Y. 239.

The Legislature has power to regulate the use of piers and wharves in the city of New York, although the same are the property of the corporation.

Mayor v. Fulton M. F. Assn., 3 How. Pr., N. S., 491, 500.

In re Union Ferry Co, 98 N. Y. 139.

The Legislature has a broad scope in directing the levy of taxes by municipalities for *local* public improvements. The only limitation appears to be that the money to be raised must be required for some purpose that "*in some sense*," at least, can be said to be "*public*." It cannot authorize taxation for the purpose of making gifts or paying gratuities to private individuals [N. Y. Const., Art. VIII, § 10]. But the purpose may be wholly a local one.

Bush v. Bd. of Supervisors, 159 N. Y. 212, 216.

N. Y. Const., Art VIII, § 10.

We have already stated that municipalities may have acquired and may own property in a purely private capacity which will be protected from confiscation, and which cannot be taken away from it without compensation (Hunter v. Pittsburgh, 207

U. S. 161, 180). But no such situation is presented by the legislative action in this case.

An uncompensated obedience to legitimate regulations established by the State in carrying out its public policy would not constitute an unconstitutional deprivation of property.

Chicago & A. R. R. *v.* Tranbarger, 238 U. S. 67, 78.

Northern Pac. Ry. *v.* Duluth, 208 U. S. 583, 597.

The limitation upon the right of the legislature not to interfere in the affairs of a municipal corporation with respect to its purely "private" affairs, means those affairs which are of *no public concern*. It means, for example, that the legislature cannot compel a municipality to engage in a business enterprise which does not affect the public welfare or benefit the public in *any* sense. For that reason it has been held that the legislature cannot exercise control over the property of a municipal corporation to the extent of compelling it to spend its money in the furtherance of purely private schemes such as the purchase of stock in a railroad company (Peo. *ex rel.* R. R. Co. *v.* Batchellor, 53 N. Y. 128).‡

The legislature has the power, nevertheless, to compel a municipality to assume debts or otherwise pay the expenses, or at least part of the expenses, in matters in which private corporations and the municipality have a joint interest. The mere fact that those matters are in a sense private, does not affect the power of the legislature, so long as the enterprise or the improvement,

‡See, however, Thompson *v.* Perrine, 103 U. S. 806.

though private in a certain broad sense, which we have already discussed, in some way concerns the public as such. And not only may the legislature impose the obligation to pay such debts on the municipality (*Tocci v. Mayor*, 73 Hun, 46), but it may designate officials other than municipal officers to conduct the enterprise and provide that they shall have the power to contract indebtedness in that connection for the municipality to pay (*Peo. ex rel. Simon v. Bradley*, 207 N. Y., 592; *Perkins v. Slack*, 86 Pa., 270).

In *Tocci v. Mayor* (*supra*), a taxpayer's application for an injunction to restrain payments to the railroad companies by the City of New York, called into question the constitutionality of a statute which provided for the payment, up to \$750,000, of one-half of the cost of changing the grade of the upper part of Park Avenue so as to enable the N. Y. Central trains to run over ground instead of under ground to the Harlem River. The act provided among other things that all of the new improvement was to be devoted to the exclusive use of the railroad companies and provided for the imposition of a fine against trespassing.

The City of New York was not consulted about either its desire to have this improvement or the extent to which it cared to participate in its expense. The act was declared constitutional. It is clear that the legislature provided for the taking of the city's property against its will by providing for the payment by it of the expense of the improvement without asking for its consent. In a certain broad sense of the use of the word "private" this may have been a *private* matter, but it was nevertheless *affected with a public*

interest. That sufficiently justified legislative interference with the city to the extent of directing how its money should be expended and for what purposes its taxes might be levied.

In *People ex rel. Simon v. Bradley* (207 N. Y. 592), the constitutionality of the Buffalo terminal act was called into question. The statute created a railway terminal station Commission, designating by name most of its members, giving them the power to change the grade of streets at railway crossings, etc., and in general to provide for adequate freight and passenger depots and other terminal facilities. The expense was to be borne by the city of Buffalo and the Railroad Companies, and the Commission was authorized to make contracts binding on the city of Buffalo in the execution of its work, and the city was required to pay these debts.

The purpose of the act, as determined in the majority opinion of the court, was to relieve the public from the danger and delay due to the running of railroads at grade and to provide adequate facilities for passengers and freight so as to enhance the *commercial importance of the city of Buffalo.*

One of the questions in that case was whether the city was being compelled to spend its money, directly or indirectly for a *private* purpose.

It is quite evident that the City of Buffalo was not only compelled to go into debt without its approval being required, with reference to the change of grade in its streets, which may easily be conceded by all to be a "public" matter, but that it was also required to participate in the expense of the erection of new railroad terminals. To

those who demand a restriction of legislative powers over municipal affairs to matters which are public in the narrow sense (*i. e.* sovereign) and who would deny to the legislature control over the affairs of a municipality in the broad sense in which they necessarily use that term, it must be apparent that this statute compelled the expenditure of the city's money in a matter, so far as the terminal stations are concerned, which they call private, and the provisions affecting which were inseparable from those concerned with street grades and which are clearly public. Accordingly, the view necessarily taken by the majority of the Court of Appeals in that case is that the provisions which saddle on the city part of the cost of building new railroad terminals contemplated that as something which was not a matter of purely private concern, and that the erection of terminal stations in a city is a public as well as a private matter. In other words, the effect of the decision in this case is that the word private must be given a narrow meaning and the word "public" a broad meaning; and that any question of a restriction of legislative power over municipalities so far as so called private matters are concerned must necessarily be limited in its application to matters which are private in the narrowest sense and are absolutely unaffected by any public interest.

This case follows the established policy of the courts of New York as expressed in the *Darlington* case, (31 N. Y. 160), to place no restriction on legislative power over municipalities which is not embraced in some *specific* constitutional provision.

Potter v. Collins (19 App. Div. 392, *aff'd* 156 N. Y. 16) involved the power of the legislature

to provide, without consulting the City of New York, that its streets, the fee of which is in the City, be torn up so as to permit a street railroad to change its method of operation from horse to underground electric power. INGRAHAM, J., said:

"In the discussion of this question we must keep clearly in mind the power of the Legislature over the property of municipal corporations held by them for public use. The principle may be stated, in its broadest sense, as settled by the repeated adjudications of the courts of this State, that the legislative power, unless restricted by special constitutional provision, is absolute as to the control over such property so held by municipal corporations. The Legislature may direct a municipal corporation to apply the property held by it to any public use which the Legislature, in its discretion, considers will be for the benefit of the public. So far as the public interests in the streets of the city of New York are effected, the power of the Legislature over them is absolute, subject to express restrictions contained in the Constitution. Thus Judge Dillon, in his work on Municipal Corporations (Vol. 2, §657, p. 780), says: 'As respects the public or municipalities, there is * * * no limit upon the power of the Legislature as to the uses to which * * * streets may be devoted.' And this principle has been applied many times by the courts of this state. In the case of *People v. Kerr* (27 N. Y. 192) it was expressly held that, so far as the existing public rights in the streets in the city of New York are concerned, such as the right of passage over them as common highways, the Legislature has supreme control over them; that so long as the use to which the highway or any other public property or right is to be applied is a public use, it is a matter of discretion in the Legislature

to permit its application or transfer, and the people must question their action elsewhere than in the courts. And in the case of *Darlington v. The Mayor, etc., of New York* (31 N. Y. 187) it was distinctly held that the Legislature had the power to divert any of the property held by the City to any public use that concerned the city or its inhabitants. Judge Dillon, in speaking of the general legislative power of municipal corporations, says: 'The Legislature as the trustee for * * * the general public, has full control over the public property and the public rights of municipal corporations. Accordingly, it may authorize a railroad company to occupy the streets in a city, without its consent and without payment.' (1 Dillon on Mun. Corp. §71, p. 121.) And in the *Matter of N. Y. Elevated R. R. Co.* (70 N. Y. 327). It was expressly held that the constitutional provisions of the State of New York do not prohibit a private or local bill amending the charter of a private corporation by regulating powers, rights, privileges and franchises which it previously possessed; that a bill may be passed to regulate and control the right to lay down tracks previously existing, or to give new privileges or franchises, provided they be not exclusive, and that a bill may also be passed waiving a forfeiture of corporate rights, or giving a private railroad corporation the right to use new motive power provided the right be not exclusive.

"The Legislature has thus the absolute power to require the municipal corporation of the city of New York to apply the property held by it for such public use as the Legislature shall direct. It had the power to grant to a railroad company the use of the streets for a railroad. (*People v. Kerr, supra*; *Kellinger v. Forty-second Street, etc., R. R. Co.*, 50 N. Y. 206.) It had also the right to apply any other property or property right held

by the City of New York to such a public use, without compensation to the city."

Potter v. Collis, 19 App. Div. 392, 395-396-397; aff'd. 156 N. Y. 16.

The view taken in this case of the meaning of the word "public" in defining the power of the legislature over the affairs and property of a municipality is the broad view for which we contend. In a narrow sense, the use of the property of a municipal corporation in furtherance of the plans of a railroad company in changing its motive power is certainly private. Only in the very broadest view of that term can this use be said to be public.

In *Higginson v. Boston* (212 Mass. 583), the court considered a statute which provided for the erection of a school building in a park, the fee of which was owned by the city. In its interpretation of the statute the court held that this did not authorize the erection of a building, a large part of which was to be devoted to offices for school officials. The Court said, however, that it recognized the right of the legislature to divert municipal property to one public use from another, without the consent of the municipality.

The broad powers of a State legislature in municipal affairs, and its control over the expenditure of municipal funds, and the broad view taken of public as distinguished from private matters are all recognized in *Kingman and others, petitioners* (163 Mass. 566). In that case the legislature created a Metropolitan Sewer District, embracing in its borders a number of municipalities and provided that the cost be apportioned

among the municipalities by the Commission which it organized as a State body. It was found that the municipalities affected had in some instances actually expended money in furtherance of new local sewage systems and had already entered into contracts in pursuance of such schemes.

C. ALLEN, J., said:

“And in reference to these and other like burdens, it may be said in general, that it is within the proper province of the Legislature to determine where they shall rest, either in the first instance or finally. The Legislature may properly determine that the whole or a part of the cost shall be borne by the Commonwealth, or it may impose it wholly upon counties, or wholly upon towns, or a part upon each. And in doing so it is not necessarily limited by county or town lines. Indeed, as has often been declared, the Legislature may change county or town lines at will, and may provide how their respective properties and debts shall be shared and adjusted. *Opinion of Justices*, 6 Cush. 578. *Stone v. Charlestown*, 114 Mass. 214. *Coolidge v. Brookline*, 114 Mass. 592. *Weymouth & Braintree Fire District v. County Commissioners*, 108 Mass. 142, *Commonwealth v. Plaisted*, 148 Mass. 375, 386. Instead of changing lines, the Legislature may apportion the burdens in such a manner as will tend to secure fairness and equality. Absolute equality in the distribution of burdens of course is not to be hoped for. But with a view to the nearest approach to it that is possible, the Constitution wisely vests a large and general power in the Legislature. And if at any time it is found, either from a change of circumstances or otherwise, that the burden presses too hardly upon a particular town or county, the Legislature may

change it. Nor does the fact that the money has been advanced in the first instance from the treasury of the Commonwealth prevent the Legislature from providing for a reimbursement from counties, cities, or towns. It may often be more convenient, and is conspicuously so in the case before us, to have the money thus advanced in the first instance, and afterwards apportioned upon those cities and towns which are finally to pay it, and this course has sometimes been followed in requiring a county to pay in the first instance from the county treasury for an improvement, the cost of which was ultimately to be borne, wholly or in part, by towns. In such cases, it is virtually a lending of money, like the grants of State aid to railroads.

* * * * *

“It is urged by the respondents as an objection to the view taken above, that the various cities and towns are to have no ownership in the property of the sewers and works which they are required to pay for, and no right to use the same except under rules prescribed by the Legislature. No express authority is cited in support of this objection, and we see no valid ground upon which it can rest. A town is required by law to build highways, and to keep them in repair, but it has no separate ownership nor exclusive use of them. The highway surveyors, through whose agency the roads are kept in repair, are held to be public officers, and not agents of the town. *Walcott v. Swampscott*, 1 Allen, 101. *Barney v. Lowell*, 98 Mass. 570. No doubt the Legislature might provide for the appointment of public roadmasters entirely independent of the towns, and still require the towns to pay the expenses of keeping the roads in repair. It is indeed in one respect more beneficial to the cities and towns not to have the ownership or care of the sewers, be-

cause otherwise they might be held responsible for negligence in the care of them. *Child v. Boston*, 4 Allen, 41. The supposition is not to be entertained that the Commonwealth will shut off any one of the cities and towns, which are required to contribute, from the use of the sewers under reasonable rules and regulations. From the extent of the system of sewerage, and the number of towns involved, harmonious and effective management may well have been thought to be best secured through officers of the State. It cannot for a moment be supposed that the Legislature would consciously do injustice to a particular city or town. There is no valid ground or reason on which the Legislature is bound to vest in a city or town the technical title to the works which constitute a public improvement to which the city or town has been required to contribute. *Stone v. Charlestown*, 114 Mass. 214, 223, 224."

Kingman & Others, Petitioners, 153 Mass. 566, 573-575.

The municipalities affected were required to spend money on property which continued to belong to the state and over which they had no control. That was, nevertheless, not considered a valid objection to legislative authority to enact legislation producing such a result. The legislative control over municipalities is complete in sewage matters but those are public matters in a constitutional sense. And here may be noted an evidence of the distinction between governmental and private matters so far as municipal tort liability is concerned, and the public and private affairs of a municipality so far as the power of the legislature is concerned. The Supreme Judicial Court of Massachusetts sustains the statute con-

cerning the sewage system as a valid exercise of legislative power over municipalities because it is a matter of general public concern. At the same time it points out that if the municipalities had control of their sewer systems they would be liable in damages for negligence in the care of them (*supra*). The principle on which this liability is based is that the municipality is not exercising a "governmental" (sovereign) function. This local function, private in a certain sense, that is, when referring to municipal tort liability, is nevertheless, *public* so far as legislative power is concerned. The error of applying to this question cases concerned with the tort liability of municipalities must be apparent.

This distinction is further illustrated in *Lloyd v. Mayor* (5 N. Y. 369), where the City of New York was held to be liable for injuries arising from the negligence of its officials in the repair of its sewers. While the liability of the City was made to depend upon its private character in the exercise of its municipal functions with respect to its sewers, this was not confused by the Court with the power of the legislature to enact statutes affecting that very subject, because in that respect the matter is public. Foot, J., said:

"The act which caused the injury in the present case, was performed under the power and duty to clear the sewers of the city. Legislation, or in other words the establishing of rules and regulations in respect to cleaning the sewers, or keeping them in a state of cleanliness, is *one* thing, and the *act* of cleaning them is *another*. The power and duty to perform the latter is clearly ministerial, and falls under the class of private powers."

Lloyd v. Mayor, 5 N. Y. 369, 375.

Without in any way impairing the soundness of the decision in *Lloyd v. Mayor, supra*, the same Court has held that the legislature has full control over municipalities in the construction of their sewer systems to the extent even of regulating the manner in which they shall be constructed.

In *Matter of Prot. Epis. School* (46 N. Y. 178), RAPALLO, J., said:

"By the act of April 12, 1865, the construction of any sewer or drain in the City of New York is absolutely prohibited, unless such sewer or drain shall be in accordance with a general plan, devised by the Croton board, for the sewerage of the particular district in which such sewer or drain is proposed to be constructed. * * *"

"It is not material to pass upon the question of the constitutionality of the act of 1861 (Chap. 308), or whether, on the opening of the bids, the lowest bidder acquired a vested right to a contract for the construction of the sewer. Assuming that he did, or even that the city had entered into a formal contract with him before the passage of the act of 1865, such contract would not deprive the legislature of the power to prohibit the construction of the sewer.

"Whether the city would be discharged by the act from liability to the contractor for damages for the breach of the contract is a different question. **But the power of the legislature to regulate the manner in which public works of this description shall be constructed cannot be foreclosed by any contract of a municipal corporation for the doing of the work.**"

Matter of the Protestant Episcopal School,
46 N. Y., 178, 180-181.

Cf. *Milwaukee Elec. Ry. v. Wisconsin R.R. Comm.*, 238 U. S. 174.

Hudson Co. Water Co. v. McCarter, 209 U. S. 349, 357.

See also:

Adams Petitioner, 165 Mass. 497, 500.

Lloyd v. Mayor, supra, and *Matter of Prot. Epis. School, supra*, taken together fairly express our view of the question under discussion. The legislature may enact statutes concerning public matters even though in the conduct of these matters the municipality is liable for its torts on the theory that it is acting in a private capacity. The legislature's power proceeds from the public nature of the subject. There is no inconsistency in the two doctrines. The difficulty, if there be any, arises from the loose and varying use of terms. Public and private applied to *legislative power* means something very different from public and private applied to a question of municipal tort liability. The term private, *so far as the legislature is concerned in its power over municipalities*, is of very limited scope. But since the adoption of the theory that a municipality is liable for torts in the exercise of its municipal or private affairs, necessity has required the extension of the term private so as not to permit wrongs to go unremedied. This policy has given a wide application to the word private, and a very narrow application to the word public. If the word public as used in connection with municipal tort liability were applied to legislative power under the constitution, we submit that more than half of each of the municipal charters of the cities of almost every State would be invalid.

In *Prince v. Crocker* (166 Mass. 347) the Boston Subway Act was held constitutional. This provided for the building of the Boston Subway in

the city streets by commissioners who were not city officials and without control by the city, and providing for the assumption, by the City of Boston, of the debts arising from its construction.

The Court said:

"It has, however, been established, by a great weight of usage and authority, that the Legislature may impose such a duty and burden upon towns and cities without their own consent. We do not deem it necessary to go into an extended discussion of this subject, or to consider what objects may be so special or local in their character as not to come within the general rule. As to roads of all kinds, and bridges and sewers, the doctrine is well established, in this Commonwealth and elsewhere, that the Legislature may prescribe what shall be done, and require cities and towns to bear the expense to such an extent and in such proportions as it may determine. The powers which have been given to cities and towns by the Legislature, by special or by general laws, are in no sense a contract, and do not become vested rights as against the Legislature. *Coolidge vs. Brookline*, 114 Mass. 592, 596, 597. *Agawam v. Hampden*, 130 Mass. 528, 530. *Kingman, petitioner*, 153 Mass. 566, 573-576. *People v. Morris*, 13 Wend. 325. *Sloan v. State*, 8 Blackf. 361. *People v. Flagg*, 46 N. Y. 401. *Philadelphia v. Field*, 58 Penn. St. 320. *Pumphrey v. Baltimore*, 47 Md. 145. *Dillon Mun. Corp.* (4th ed.) §§54, 73, 74, 831, and other cases there cited."

Prince v. Crocker, 166 Mass. 347, 359.

If a person were injured through negligence in this subway while under the City's control, we submit that there would be no question of the municipality's liability because it would be said that this was a matter of the local and private concern

of the municipality. Nevertheless, the legislature derives its power to make the enactment in question because it is a matter of public concern, and therefore it may direct the use of municipal property to this enterprise and saddle debts on the city in furtherance of this business. The municipality in controlling this subway would be liable for its negligent operation because it is not a "governmental" matter. But the legislature's authority flows from the fact that it is a governmental matter. In other words the use of the terms public and private as well as governmental varies with the subject. Where legislative power is concerned, public is the broad and almost all inclusive term. Where municipal liability is involved private is the term broadly applied and perhaps even stretched like a band of rubber.

Other cases in which the proposition is in effect either decided or asserted that a municipal corporation is simply an agency of the state for the conduct of the affairs of government, general and local, and, therefore, *subject to the control of the legislature in all respects except as expressly limited by the Constitution* are:

In *re* Protestant Episcopal School, 46 N. Y. 178.

Terrett v. Taylor, 9 Cranch, 43.

Payne v. Treadwell, 16 Cal. 221.

Jones v. Town of Lake view, 151 Ill. 663.

Mayor, etc., of Frederick v. Groshon, 30 Md. 436.

Groff v. Mayor, etc., of Frederick City, 44 Md. 67.

State Bank v. Madison, 3 Ind. 43.

City of Paterson v. Society for E. U. M.,
24 N. J. L. 385.

State ex rel. Cleveland v. Board of Finance,
etc., 38 N. J. L. 259.

In re Dalton, 61 Kan. 257.

In considering a question of the nature of that which is presented in this case we must not be misled by words or terminology. Whether we call the construction of public works and the operation of public utilities "governmental" or "proprietary", "non-governmental" or "*quasi-private*", the fact remains that such works are in every real sense of the word "*public undertakings*" and, to use the words of the Court of Appeals, "**in all of the public undertakings, the State is the proprietor**" (*Ryan v. City of New York*, 177 N. Y. 271, 273).

In *Ryan v. City of New York* (177 N. Y. 271) which involved the question of the validity of the Labor Law provision requiring the payment by municipalities of the prevailing rate of wages to persons employed upon public works, the Court said:

"The authority of the state is supreme in every part of it and in all the public undertakings the state is the proprietor. For convenience of local administration the state has been divided into municipalities, in each of which there may be found local officers exercising a certain measure of authority, but in that which they do they are but the agents of the state, without power to do a single act beyond the boundary set by the state acting through its legislature. Thus all of these agencies and employees in the several munic-

ipalities are doing the work of the state, which is the sovereign *and master*."

Ryan *v.* City of New York, 177 N. Y. 271, 273-274.

See also:

People *ex rel.* Williams E. & C. Co. *v.* Metz, 193 N. Y. 148.

The term "public works" has a far broader scope and significance than the term "governmental functions" in the limited sense in which the latter term is used in negligence cases.

The opening of a street is a "public work" even though it be a matter of local concern.

In *Astor v. Mayor* (62 N. Y. 580, 589), the Court said:

"It is certainly local in fact, being confined to the corporate boundaries of a city; and cannot be properly said to be a general public improvement, diverted entirely of any local characteristics. The property of the locality pays for it, and the citizens mainly enjoy the advantage to be derived from it. That it is a "public work", in which the community are more or less interested, cannot be questioned."

This statute relates to the "construction" of "public works"; and even if it be assumed that general—such as "due process"—constitutional provisions which will operate as restraints upon the legislative power would be equally applicable to restrain legislation affecting a municipal corporation in some *purely private* capacity, such as preventing the arbitrary confiscation of its "pri-

vate" property, such provisions clearly would *not* operate to restrict legislation affecting municipalities in matters which, while they may be *in one sense* of the word "private," are nevertheless "affected with a public interest" and are "public" undertakings in every real respect undertaken by legislative sanction and direction. They are *public* functions of the municipality, and as such they are subject to public control—expressed through legislation.

The view taken by the New York Courts is, as we have said, that "in all of the public undertakings the State is the proprietor" (*Ryan v. City of New York*, 177 N. Y. 271, 273-274), and that a municipality possesses no powers except such as are expressly conferred upon it by the legislature (*vid. McMullen v. City of Middletown, supra*).

This Court has frequently considered the relations of a municipal corporation to the State.

In *Barnes v. District of Columbia* (91 U. S. 540, 544) the Court said:

"A municipal corporation, in the exercise of all of its duties, *including those most strictly local or internal*, is but a department of the State. The legislature may give it all the powers such a being is capable of receiving, making it a miniature state within its locality. Again: it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all the powers usually committed to a municipality. We do not regard its acts as sometimes those of an agency of the State, and at others those of a municipality; but that, its character and nature, remaining at all times the same, it is

great or small according as the legislature shall extend or contract the sphere of its action."

In *Williams v. Eggleston* (170 U. S. 304, 310) the Court said:

"A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the State for conducting the affairs of government, and as such it is subject to the control of the legislature. That body may place one part of the State under one municipal organization and another part of the State under another organization of an entirely different character. These are matters of a purely local nature, in respect to which the Federal Constitution does not limit the power of the State. 'Whether territory shall be governed for local purposes by a county, a city or township organization, is one of the most usual and ordinary subjects of State legislation.' "

In *Barnett v. Denison* (145 U. S. 132, 139) the Court said:

"It is the settled doctrine of this court that municipal corporations are merely agents of the state government for local purposes, and possess only such powers as are expressly given, or implied, because essential to carry into effect such as are expressly granted."

In *Hill v. Memphis* (134 U. S. 198, 203), the Court said:

"Municipal corporations are established for purposes of local government, and in the absence of specific delegation of power cannot engage in any undertakings not directed immediately to the accomplishment of those purposes."

In *United States v. Railroad Company* (84 U. S. 322, 328, 329), the Court said:

"The inquiry arises, what is the nature and character of municipal corporations, and what is their connection with the government of the State?

"A work on corporation says, that inferior and subordinate communities, *imperia in imperio*, such as cities and towns, * * * are allowed to assume to themselves some of the duties of the State in a partial or detailed form, but having neither property or power for the purposes of personal aggrandizement, they can be considered in no other light than as auxiliaries of the government, and as the secondary deputies and trustees and servants of the people.

"It is said further by the same authority, the main distinction between public and private corporations is, that over the former the legislature, as guardian of the public interests, has the exclusive and unrestrained control; and acting as such, as it may create, so it may modify or destroy, as public exigency requires or recommends, or the public interest will be best subserved. It possesses the right to alter, abolish or destroy all such institutions, as mere municipal regulations must, from the nature of things, be subject to the absolute control of the government. 'Such institutions (it is added) are auxiliaries of the government in the important business of municipal rule.' "

In *Rogers v. Burlington* (70 U. S. 654, 663), the Court said:

"Municipal corporations are created by the legislature, and they derive all their powers from the source of their creation; and those powers are at all times subject to the

control of the legislature. Such powers, also, in the absence of any constitutional regulation forbidding it, may be enlarged or diminished, extended or curtailed, or withdrawn altogether, as the legislature shall determine. Construction and repair of highways or streets for public travel within their limits are among the usual purposes of their creation, and the expenses of accomplishing those objects are among their usual and ordinary burdens."

Equally emphatic expressions will be found in:

Worcester v. Street Ry. Co., 196 U. S. 539, 550-552 [where a number of the cases are collated].

Mount Pleasant v. Beckwith, 100 U. S. 514, 524.

Meriweather v. Garrett, 102 U. S. 472, 513.

Met. R. Co. v. Dist. of Columbia, 132 U. S. 1, 8.

Laramie County v. Albany County, 92 U. S. 307.

New Orleans v. Clark, 95 U. S. 644, 654.

Atkin v. Kansas, 191 U. S. 207.

Recent expressions of this Court are that "municipalities are mere emanations from the State exercising such public power as the State chooses to grant" (*Boise Water Co. v. Boise City*, 230 U. S. 84, 94), that they are creatures of the State and derive their powers from the laws thereof (*Old Colony Trust Co. v. Omaha*, 230 U. S. 100).

To summarize the foregoing, it may be said that municipal corporations are "public" corporations created for purposes connected with the ad-

ministration of civil or local government, and as such the power of the legislature over them is supreme and transcendent; they may be abolished at the legislative will or pleasure, and its power is supreme except where it is restrained by *specific* constitutional provisions regulating or restricting its authority over them. They have *no vested rights against the state*, and are subject to the state's control expressed through its legislative enactments, the medium by which the State, as the sovereign and master, gives expression to its will.

POINT III.

The statute does not contravene the provision of the Federal Constitution (Art. I, §10) prohibiting the passage by the States of *ex post facto* laws or laws impairing the obligation of contracts.

This provision of the Constitution is directed only against "*legislative*" action by the States.

Cleveland & Pittsburgh R. R. v. Cleveland,
235 U. S. 50, 53-54;

Ross v. Oregon, 227 U. S. 150, 161;

Moore-Mansfield Cons. Co. v. Electrical
Installation Co., 234 U. S. 619, 624;

Frank v. Mangum, 237 U. S. 180, 183-184.

The enactment of the statute in question *preceded* the making of the contract between the City

of New York and the defendant, and it also preceded the employment of the alien by the contractor.

1. The term "*ex post facto* law" within the meaning of the Constitution has been defined by this court to include, in its *broadest* aspect.

"1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the the offense, in order to convict the offender."

Malloy v. South Carolina, 237 U. S. 180, 183-184—quoting Mr. Justice Chase in Calder v. Bull, 3 Dall, 386, 390-391.

The first clause of this definition is the only one which the plaintiff-in-error will seek to invoke. His argument is founded on a misconception of its meaning. What he really claims is that his act was *inherently* innocent and that it was beyond the legislative power by its fiat to declare an act of that nature a crime. His claim in substance is that an act which is inherently innocent *cannot* be declared criminal by legislative enactment.

The answer to this contention is that an act cannot be innocent which violates *existing* law,

and that the contention ignores the distinction between *malum in se* and *malum prohibitum*.

Shevlin-Carp. Co. v. Minnesota, 218 U. S. 57, 68, 69.

People v. West 106 N. Y. 293, 296.

The statute was in existence when the act of the plaintiff-in-error was committed, and it was construed and applied prospectively only.

A precisely similar contention was made by the plaintiff-in-error in the case of *Shevlin-Carpenter Co. v. Minnesota* (218 U. S. 57, 67), and answered by this court as follows:

"It will be seen that the foundation of the arguments of plaintiffs-in-error is that their trespass was an innocent act. There is some ambiguity as to what is meant by 'innocence'. They quote Mr. Justice Chase in *Calder v. Bull*, 3 Dall., 386. It was there said that 'a law that punished a citizen for an innocent action, or, in other words, for an act, which when done, was in violation of no existing law,' could not 'be considered a rightful exercise of legislative power'. But it was said: 'The legislature may enjoin, permit, forbid and punish; they may declare new crimes and establish rules of conduct for all its citizens in future cases.' In other words, innocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse. The law in controversy has no *ex post facto* element or effect in it. It was existing law when the trespass of plaintiffs-in-error was committed, and a trespass is a legal wrong, not an innocent act. There is no element of deception or surprise in the law."

Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 68-69.

2. The contract of the plaintiff in error with the municipality was made subsequent to the enactment of the statute. Consequently the statute cannot constitute an impairment of its obligation within the meaning of the constitutional provision.

The statute was construed and applied prospectively only. This court will accept the interpretation of the statute adopted by the state court and will apply that interpretation to its decision of the controverted question.

Sioux Remedy Co. v. Cope, 235 U. S. 197, 201;

Willoughby v. Chicago, 235 U. S. 45, 49-50.

And even in the absence of a construction of a state statute by the courts of the State, it will be assumed that such a construction will be adopted as will be consistent with constitutional limitations.

Mallinckrodt Works v. St. Louis, 238 U. S. 41, 54.

St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 369.

It is a general and elementary rule that statutes will be construed to be prospective only (*Calder v. Bull*, 3 Dall. 386, 391; *Waugh v. Miss. University*, 237 U. S. 589, 595), unless a contrary intent is unavoidable from the language used; and if a statute is susceptible of two constructions, one of which would render it unconstitutional and the other valid, that which upholds it will be adopted.

St. Louis S. W. Ry. v. Arkansas (*supra*);
Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 546;

People ex rel. Simon v. Bradley, 207 N. Y. 592, 610-611.

3. It may be further added that the plaintiff-in-error, as he does not come within the class of persons who would be adversely affected by a retrospective operation of the statute, is not in a position to raise any such question. One who questions the validity of a law must show that its alleged unconstitutional feature injures him, or, at least the class to which he belongs.

Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544-545;

Rosenthal v. New York, 226 U. S. 260, 271;

Engel v. O'Malley, 219 U. S. 128.

Mallinckrodt Works v. St. Louis, 238 U. S. 41, 54.

It will be time enough to determine the validity of the statute, if construed to operate retrospectively when such a construction and application are given it by the State Courts.

St. Louis S. W. Ry. v. Arkansas (*supra*).

POINT IV.

The statute is not in conflict with existing treaties.

We now take up the question as to whether the provision of the statute under consideration is in conflict with the treaty contracted between the United States Government and Italy—or the treaties between the United States Government and other foreign nations.

The only aliens who were involved in this case were Italians. Hence, we submit the treaties with other nations do not require consideration. They are not involved.

The Treaty with Italy contains the following provision, which was substituted in 1913 for Article III of the Treaty of 1871:

“The citizens of each of the High Contracting parties shall receive in the States and Territories of the other the *most constant security and protection for their persons and property and for their rights*, including that form of protection granted by any State or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs; and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter.”

The following provisions were contained in the Treaty of 1871:

“ARTICLE II.

“The citizens of each of the high contracting parties shall have liberty to travel in the States and Territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established.”

"ARTICLE III.

"The citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives.

"They shall, however, be exempt in their respective territories from compulsory military service, either on land or sea, in the regular forces, or in the national guard, or in the militia. They shall likewise be exempt from any judicial or municipal office, and from any contribution whatever, in kind or in money, to be levied in compensation for personal services."

It is not disputed that the treaty making power is vested in the Federal Government by the States and that it has power to bind the States by any treaty contracted in the exercise of its lawful competence. The treaty making power is not unlimited, for the states, except in so far as they have surrendered their sovereign powers to the general government, retain all the attributes of sovereignty, (*United States v. Cruikshank*, 92 U. S., 542; *Chisholm v. Georgia*, 2 Dall., 419, 435) and it would hardly be disputed that not even the Federal Government under the treaty making power, has any authority to barter away the reserved rights of a sovereign state or to contract with a foreign power for the surrender of those rights, except in so far as that right is expressly granted to the general government by the Federal constitution, or is necessary to the proper

performance of the functions and fulfillment of the legitimate purposes of the National Government.

It is true that, while a subsequent *Federal* statute may annul or abrogate a treaty, no *State* statute can do so. As respects the *State* statute the treaty is the paramount law, and the state statute, if inconsistent therewith, must yield and become inoperative to the extent of the inconsistency (*Ware v. Hylton*, 3 Dall. 199). The treaty so far as *State* statutes are concerned is the "supreme law of the land"—subject only to the provisions of the Federal constitution.

A treaty of the United States stands upon the same footing as a Federal statute (*United States v. Rauscher*, 119 U. S. 407, 418; *Head Money Cases*, 112 U. S. 580). It is not a bar to legislation by the states, but if a state statute comes in conflict with it, the state statute, as we have said, must yield, or rather become inoperative to the extent of the conflict, as the treaty becomes the paramount law (U. S. Const. Art. VI, §2); but before the state statute must yield, a manifest conflict between it and the treaty must be shown; and we confidently submit that there is no conflict between the statutory provision in question and any treaty contracted by the Federal Government with a European or other nation—properly and reasonably construed, and we repeat here that, notwithstanding that the equality clause of the Fourteenth Amendment protects aliens as well as citizens in their fundamental rights, it does not guarantee to them that either the state or the subdivisions of the state, or the individual citizen shall give them employment against its or his will [*vid ante*, Point II].

“That a treaty is no more the supreme law of the land than is an act of Congress is shown by the fact that an act of Congress vacates *pro tanto* a prior inconsistent treaty. Whenever therefore, an act of Congress would be unconstitutional, as invading the reserved rights of the states, a treaty to the same effect would be unconstitutional.”

Moore, Int. Dig., Vol. 5, p. 166—citing:
Provost *v.* Greneaux, 19 How. 7.

RAWLE, in his work on the Constitution, says [p. 66]:

“There is a variance in the words descriptive of laws and those of treaties. In the former it is said those which shall be made in pursuance of the Constitution, but treaties are described as having been made or which shall be made, under the authority of the United States. The explanation is that at the time of adopting the Constitution, certain treaties existed, which had been made by Congress under the Confederation, the continuing obligations of which it was proper to declare. The words ‘under the authority of the United States’ were considered as extending equally to those previously made and to those which should subsequently be effected. But although the former could not be considered as made pursuant to a Constitution which was not then in existence, the latter would not be ‘under the authority of the United States’ *unless they were conformable to its Constitution.*”

In *License Cases* (5 How., 504, 612-613), Mr. Justice Daniel said:

“Laws of the United States, in order to be binding, must be within the legitimate powers

vested by the Constitution. Treaties to be valid, must be within the scope of the same powers; for there can be no 'Authority of the United States' save what is derived mediately or immediately, and regularly and legitimately from the constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State, or of any citizen of a State. In cases of alleged conflict between a law of the United States and the Constitution, or between the law of a State and the Constitution or a statute of the United States, this court must pronounce upon the validity of either law with reference to the constitution."

In *United States v. Rhodes* (Fed. Cases No. 16151 [27 Fed. Cas. 785, 790], Mr. Justice Swayne said:

"A treaty is declared by the Constitution to be 'the law of the land.' " "What is unwarranted or forbidden by the Constitution can no more be done in one way than in another. The authority of the national government is limited, though supreme in the sphere of its operation. As compared with the State governments, the subjects upon which it operates are few in number. Its objects are all national. It is one wholly of delegated powers. The States possess all which they have not surrendered; the government of the union only such as the Constitution has given to it, expressly or incidentally, and by reasonable intendment. Whenever an act of that government is challenged a grant of power must be shown or the act is void."

In *Holden v. Joy* (17 Wall. 211, 243), Mr. Justice Clifford, speaking of the treaty-making power, said that inasmuch as it was given in general terms, without any description of the objects to

be embraced within its scope, it must be assumed that

“the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States.”

Citing

Holmes *v.* Jennison, 14 Pet. 569.

1 Kent 166.

2 Story on the Const., §1508.

7 Hamilton's Works, 501.

Duer's Jurisprudence, 229.

In *Siemssen v. Bofer* (6 Cal., 250-252), Chief Justice Murray said:

“In my opinion, the treaty-making power can only be coeval with the express grant of power to the Federal Government, and can never be extended, by implication, to the reserved powers of the state, or matters which belong to State Sovereignty, or the right which appertains to each State to govern her own domestic concerns, and establish her own police regulations. . . .

“It cannot be contended, with any show of reason, that the Federal Government took this grant of power in the enlarged sense in which it is exercised in England, and the nations on the continent of Europe; or that she is vested with the same plenary powers that the individual States were before the adoption of the Constitution.

“The political structure of our government forbids such an idea. The power must be construed in reference to the powers delegated to the United States, and those reserved to

the States, and must be further limited to objects which are the peculiar and proper subject matter of treaty stipulation."

In *People v. Naglee*, (1 Cal. 232,) a case involving the constitutionality of a law of California requiring a license fee of all foreigners for the privilege of working the gold mines in said State, one of the questions being whether said law contravened a treaty between the United States and China, Judge Bennett, delivering the unanimous decision of the Court said:

"But even if the provisions of the statute did clash with the stipulations of that, or of any other treaty, the conclusion is not deducible that the treaty must, therefore, stand, and the State law give away. The question in such case would not be solely what is provided for by the treaty, but whether the state retained the power to enact the contested law, or had given up that power to the general government. If the state retains the power, then the president and senate cannot take it away by a treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty making department, and in relation to those subjects the jurisdiction over which has been exclusively entrusted to Congress. When it transcends these limits, like an act of Congress which transcends the constitutional authority of that body, it cannot supersede a state law which enforces or exercises any power of the State not granted away by the constitution. To hold any other doctrine than this, would, if carried out into the ultimate and possible consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective states, or which should even undertake to cede away a part or the whole of the acknowl-

edged territory of one of the states to a foreign nation. . . .

"It is not within the scope of a constitutional treaty to interfere with the reserved powers of taxation and of control over foreigners, which we have above discussed. No treaty, within our knowledge, has attempted to do it; and if such attempt should be made, the stipulation would, we apprehend, be neither recognized nor enforced by the supreme tribunal of the nation."

In *Compagnie Francaise de Navigation v. State Board of Health*, 51 La. Ann. 645, involving a conflict between an Act of Louisiana, giving powers to the State Board of Health to prohibit the introduction of infected persons, etc., and a treaty between the United States and Italy, Chief Justice Nicholls, speaking for the court, said: (660-662)

"The treaties and laws of the United States must be held to have been passed with reference to and subsidiary to the rightful exercise of the police power by the different States in aid of the protection and preservation of the public health within their respective borders." . . .

The decision of the Supreme Court of Louisiana was affirmed by this Court in an opinion written by Mr. [Chief] Justice White, which, likewise, we submit, holds that the treaty-making power must be exercised in subordination to the reserved police power of the States, and that an interpretation of a treaty will be avoided, if possible, which would bring it in conflict with an exercise of the reserved power of the States, secured to them by the Constitution.

Compagnie Francaise v. Board of Health,
186 U. S. 380, 395.

Mr. Henry St. George Tucker, in his recent work—"Limitations on the Treaty-making Power"—says [p. 81]:

"The Supreme Court has decided frequently that all matters which pertain to the health, morals, safety, etc., of the people in their domestic lives belong by right to the States to determine under their police power and are not included in any grant to the Federal Government under the Constitution. The State of Maine for nearly half a century, in obedience to the claims of health and morality of its people, has enacted and has preserved throughout that time on its statute books a prohibition law denying the right of sale or manufacture of intoxicating liquors within its bounds. Could it be claimed by anyone that a treaty between France and the United States, giving the citizens of each country the right to engage in business in the country of the other, would be effective in the State of Maine in allowing a citizen of France to open a bar-room for the sale of intoxicating liquors?"

"St. George Tucker, Story, Rawle, Willoughby, Pomery, and Cooley, and every reputable writer upon the Constitution, declare that the treaty power can do nothing which tends to destroy the Constitution itself. Can it be doubted that the power to take away the right of Congress to legislate, or the right of the people of the states to regulate their own local affairs is the power to destroy the basic principles of the Constitution of our country?"

Limitations on the Treaty Making Power,
by Henry St. George Tucker, p. 93.

"The Constitution is to prevail over a treaty where the provisions of the one come in conflict with the other" and it is not within the compe-

tence of the treaty-making power "either to modify or restrict the operation of any provision of the Constitution of the United States."

Mr. Marcy, Sec. of State to Mr. Mason,
Min. to France, Sept. 11, 1854 [Moore's
Int. Dig. Vol. V, p. 167].

A treaty, no less than the statute law "must be made in conformity with the Constitution, and where a provision in either a treaty or a law is found to contravene the principles of the Constitution such provision must give way to the superior force of the Constitution, which is the organic law of the Republic, binding alike on the government and the nation."

Mr. Blaine, Sec. of State. For Rel. 1881
[Moore's Int. Dig. Vol. V, p. 169].

In *Geofroy v. Riggs* (133 U. S., 258, 266, 267), this Court said:

"That the treaty power of the United States extends to all *proper* subjects of negotiation between our government and the governments of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries."

"The treaty power, as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and

of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids." * * *

It is true that a treaty provision giving "aliens" the right to hold or inherit land in a state will be paramount to a state law to the contrary and render the latter inoperative. Such treaties have been held to be within the competence of the treaty-making power vested in the general government (*Hauenstein v. Lynham*, 100 U. S. 483; *Chirac v. Chirac*, 2 Wheat 259). But in the absence of express treaty stipulation on the subject the state laws are valid and constitute no denial of constitutional "equality". (*Blythe v. Hinckley*, 180 U. S. 333, 340-341).

A treaty may remove the badge of "alienage" to permit the ownership or inheritance of lands, but it cannot alter the laws of descent of a State. While we do not point to any case which is a direct authority upon this latter proposition, it is, nevertheless, supported by the principle that a treaty is as powerless to regulate the strictly internal affairs of the states as is an act of Congress. A very complete and scholarly discussion of this question appears in Chapter VI of Mr. St. George Tucker's recent work *Limitations on the Treaty Making Power*.

In 1883 the United States declined to consider favorably a proposal for a treaty provision that indigent Italians should have gratuitous defense in criminal and civil proceedings in America in the same manner as indigent aliens in Italy. The proposal was declined on the ground that provision was already made by state laws—certainly in some of the states—for suits by aliens as well

as by citizens *in forma pauperis*, and that it was *not competent for the Federal Government to impose an obligation of that nature on the several States by treaty stipulation.*

Moore Int. Dig. Vol. 4, p. 8.

We have referred to these matters, not with a view of showing that the treaty in question here is unconstitutional, if properly construed, and construed in the light of its manifest purpose and intent, but with a view of showing that if such a construction were placed upon it as would require the State of New York to employ "aliens" in its own service or in the construction of its public works against its will, it would be an unconstitutional exercise of the treaty-making power, for we submit that there is *no power* vested in the Federal Government to impose a mandate to that effect upon the States, by treaty or otherwise.

It would be an unconstitutional interference with the reserved rights and powers of the States.

The construction of treaties is a judicial question (*Jones v. Meehan*, 175 U. S. 1, 32) and especially so when complaint is made that a *State* statute is in conflict therewith (Moore Int. Dig. Vol. 5, p. 238). It is a rule of construction that in construing treaties, as well as laws, their provisions will all be read together and they will be given a sensible meaning and one that appears to have been within the intention of the parties, and they will always be given a construction which will render them valid and effective (*Geofroy v. Riggs*, 133 U. S. 258, 270; *Hauenstein v. Lynham*, 100 U. S. 483, 487), and harmonize them with the general municipal law.

In construing a treaty, the rule is, as in the construction of a statute, to ascertain what was intended by the contracting parties. All its provisions are to be read together and examined in the light of surrounding circumstances. (*In re Ross*, 140 U. S., 453, 475; *Rocca v. Thompson*, 233 U. S. 317, 331-332.) A government contract, like one between individuals, should be interpreted with a view to ascertaining the intention of the parties (*Hollerbach v. United States*, 233 U. S. 165, 171).

The treaty with Italy guarantees to Italians the same measure of *protection* in their property rights and rights of liberty that are guaranteed to citizens of the United States. Its language is that they shall have "The most constant *protection and security* for their persons and property", and enjoy "in this respect" the same rights and privileges as are granted to natives. It will be searched in vain for anything which either expressly or by implication guarantees to find employment for Italians or other aliens, or which requires citizens of the United States to employ them if they do not see fit to do so, or which requires the State of New York or any other state in the Union to do likewise. The state, as well as the individual citizens, may refuse to employ aliens if it chooses so to do, and this without, in the remotest degree, violating either the spirit of the letter of *any* existing treaty. It would not, we submit, be within the competence of the Federal government, to guarantee that the subjects or citizens of a foreign nation shall receive or be eligible for employment in public works of a state of the Union or of any of its governmental subdivisions, contrary to the wishes of the State.

It will be noticed on examining the treaties that matters relating to the holding of real estate or giving causes of action and the like form the subject of *express* stipulations; and even if it be assumed for the purpose of the argument that the Federal government was vested with power to stipulate with a foreign nation that its citizens should receive employment in the public works of a state, such a matter being the conferring of a special privilege as distinguished from a general or inherent right, it would undoubtedly have taken the form of an express agreement in the treaty. Under the general language of the treaty, no such situation could have been contemplated or intended.

The general stipulations in the treaties refer merely to the *general* security of persons and property, the right to be secure in their persons, to receive the protection of the laws, to carry on trade, and to pursue their occupations unmolested; they protect general inherent rights; but nowhere is there any intention to guarantee to the aliens the right to labor for the State; nor anything in the language of the treaty which requires a state, any more than an individual employer, to employ them or give them work if it does not choose to do so, that being a question of policy for it alone to decide, and which is left to its decision. So construed it is within the scope of the treaty-making power (*Geoffroy v. Riggs*, 133 U. S. 258, 266).

In *United States v. Choctaw, Etc., Nation* (179 U. S. 494, 533), the Court, quoting the words of Story, J., said:

“In the first place, this court does not possess any treaty-making power. That power

belongs by the Constitution to another department of the Government, and to alter, amend or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter; and, having found that, our duty is to follow it as far as it goes and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind * * *. In the next place, this court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal part of the treaty, equally give the rule to the judicial tribunals” [p. 533].

—An altogether different question would be presented by a statute which prohibited corporations or private persons in their private affairs employing aliens (*In re Parrott*, 1 Fed. Rep. 481) or which discriminated against a *particular nationality* in direct violation of a treaty stipulation (*Baker v. Portland*, 2 Fed. Cas. 472).

The question involved in *Baker v. Portland* (*supra*) was the validity of a statute of the State of Oregon which prohibited the employment, by contracts, of *Chinese* upon street improvements or public works, but permitted *all other aliens* to be so employed, and it was held that it was in conflict with the treaty between the United States and China which secured to Chinese residents the same right to be employed and labor for a living as the subjects of any other nation.

But the statute in question in the case at bar does not discriminate against any particular nationality and therefore does not conflict with any treaty or with the 14th Amendment.

Comm. v. Patson, 231 Pa. St. 46, *aff'd as Patson v. Pennsylvania*, 232 U. S. 138.

In *Comm. v. Patson* (231 Pa. St., 46, 51), the Court said, respecting the statute which prohibited "any unnaturalized foreign-born resident" hunting, &c., or possessing a shot-gun or rifle of any make, that:

"This legislation is not directed against any particular nationality or special class of aliens, but prohibits 'any unnaturalized foreign-born resident' from &c." [p. 51].

That likewise distinguishes this case from *Yick Wo v. Hopkins*, 118 U. S. 356.

The Court held not only that the statute did not violate the 14th Amendment, but also that it was not in conflict with the treaty between the United States and Italy, saying, in the latter respect:

"The terms of the treaty provide for the protection and security of their persons

and property, and in this respect,—to such *protection and security*—the enjoyment of the same rights and privileges as are or shall be granted to the natives on their submitting themselves to the conditions imposed on the natives” [p. 55].

That case was affirmed by this Court as

Patson v. Pennsylvania, 232 U. S. 138,

where the Court said:

“it was pointed out below that the equality of rights that it assures is equality only in respect of protection and security for persons and property” [p. 145].

To labor for the State is no part of a person's liberty or property (*Atkin v. Kansas*, 191 U. S. 207).

The case of *People v. Warren* (13 Misc. 615) was cited below as an authority to the effect that the provision of the statute in question comes in conflict with the Italian treaty, but all that is contained in the opinion in that case is a dogmatic assertion, supported neither by authority nor by reason, and it is needless to add that the case is worthless as an authority in this Court.

The State, like a private person, may determine whom it will employ or not employ in its public undertakings, and, to use the words of this Court:

“We see nothing in the treaty that purports or attempts to cut off the exercise of their powers over the matter by the States to the full extent.”

Patson v. Penn., 232 U. S. 138, 146.

The defendant's counsel contended that if the statute came in conflict with the provisions of *any* treaty contracted between the United States and *any* foreign nation it would be *ipso facto* unconstitutional and void *in toto*. We disputed and still dispute the correctness of that proposition. We submit that a treaty being the paramount law to which a *state* statute must yield, the statute would become inoperative in so far as it conflicted with a treaty provision; that if rights were secured to Italian subjects by virtue of treaty stipulation, and those rights were adversely affected by a state statute recourse might be had to a treaty for the purpose of rendering the statute inoperative and of no binding effect. In other words, taking the situation in the case at bar, if the state statute was in conflict with the treaty with Italy, the treaty might, so to speak, be pleaded in bar or abatement to the information, or furnish a ground of defense to a prosecution instituted under the statute. In a case coming within the stipulations of the treaty the statute would give way to its superior force.

In *Maiorano v. Baltimore & Ohio R. R. Co.* (213 U. S. 268, 272-273), the Court said:

"A treaty within those limits [*i. e.*, the constitutional limits of the treaty-making power] by the express words of the Constitution, is the supreme law of the land, binding alike National and state courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights" [pp. 272-273].

As was said in the case of *In re Cooper* (143 U. S. 472, 502):

“A treaty, then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court *resorts to the treaty for a rule of decision for the case before it as it would to a statute*” [p. 502].

We take the position that the only foreigners who were in any way involved in the matters connected with the case at bar being Italians it was not necessary to discuss the treaties with other nations.

In taking that position we do not, however, overlook the “MOST FAVORED NATION” clauses of the treaty with Italy.

Doubtless a “most favored nation” clause in a treaty would have the effect of extending to the subjects of that nation any superior rights and privileges granted to another nation of the kind and character to which the “most favored nation” clauses had reference. In other words the practical effect of a “most favored nation” clause would be to read into the treaty any superior benefits or privileges relating to the subject matter of such clause, and which were expressly conferred thereby—provided they were gratuitously granted to the other nation and not in exchange for reciprocal benefits or favors (Moore Int. Dis., Vol. 5, p. 315; *Bartram v. Robertson*, 122 U. S. 116).

In the Italian treaty we find no “most favored nation” clauses which bear upon or relate to any matters of the kind involved in this case. Thus

Article XXII [Treaty of 1871] conferred the "most favored nation" privileges respecting "real estate," and Article XXIV in effect conferred "most favored nation" privileges in respect to "commerce and navigation" (*vid. Pat- sone v. Penn.*, 232 U. S. 138, 145).

We also contend that there is nothing in *any* of the treaties which secures or grants to the subjects or citizens of *any* foreign nation the right to obtain employment in the construction of the "public works" of a state, and that what has heretofore been said is equally applicable to any of the other treaties referred to by the defendant.

If the contention of the appellant, to the effect, that the provisions of the treaty which have been quoted, confer upon aliens the right to public employment under either the state or any of its subdivisions, or persons contracting with the state or any of its subdivisions, for the construction of its public works, then, by a parity, of reasoning, aliens, would have a right to employment in our Police Department, in our Army and in our Navy.

The statement of this proposition is its own refutation.

In Conclusion.

It is respectfully submitted that the statute, as construed and applied, is not in conflict with any provision of the Federal Constitution, or of any law or treaty of the United States, and that, therefore,

The judgment should be affirmed.

Respectfully submitted,
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